REPORTABLE (72)

(1) BEATRICE MTETWA (2) TAWANDA NYAMBIRAI (3) MZOKUTHULA MBUYISA (4) DOUGLAS COLTART
v
(1) RUNGWANDI AND RUJUWA LEGAL PRACTITIONERS
(2) TENDAI MURAMBIDZA

SUPREME COURT OF ZIMBABWE
BHUNU JA, MUSAKWA JA & MWAYERA JA
HARARE: 25 JULY 2022 & 25 JULY 2023

F. Mahere, for the appellants

E. Mubaiwa, for the first respondents

No appearance for the second respondent

MWAYERA JA: This is an appeal against the whole judgment of the High Court handed down on 11 May 2022. The court *a quo* granted an anti-dissipation interdict against the appellants and the second respondent.

THE FACTUAL BACKGROUND

The appellants are partners of the law firm practising as Mtetwa & Nyambirai Legal Practitioners ("Mtetwa & Nyambirai"). The first respondent is a legal firm, whose principal is Mark Rujuwa, a former associate at the appellant's law firm. The second respondent was previously employed by the appellants as an accounts clerk at their law firm. By virtue of his position as an accounts clerk, the second respondent was also a custodian of the keys to the safe of Mtetwa & Nyambirai.

Sometime in February 2022, Mtetwa & Nyambirayi discovered that the second respondent had stolen ZWL$32 000 000.00 from its trust account and converted the same to United States Dollars for his own use. Subsequently, the matter was reported to the police culminating in the arrest of the second respondent on 25 February 2022. Upon his arrest, the second respondent admitted that he stole from Mtetwa & Nyambirai and that he had indeed converted the ZWL$ amount to United States Dollars totalling US$ 128 000-00.

During a hand over-take over process that took place prior to his detention by the police, the second respondent advised that a sum of US$57 000.00 found in the safe had been given to him by Mark Rujuwa, a partner in the first respondent for safe keeping. According to the first respondent, this was money acquired from a sale of property done for one of his clients. The relationship between Mark Rujuwa and the second respondent had been formed during the time when Mark Rujuwa was employed as an associate by Mtetwa & Nyambirai, before his contract of employment ended on 31 December 2021 and he set up the first respondent law firm. It is worth noting that the US$57 000.00 which was placed in the appellant's safe was left without the appellants' knowledge or consent.

That the second respondent was misappropriating trust funds deposited in his care was discovered when the second respondent had proceeded on vacation leave from 22 February 2022. During the police investigation the second respondent handed over the cash found in his possession at his homestead as well as the rest of Mtetwa & Nyambirai's property that was in his possession. The US$57 000 which forms the subject of controversy was also recovered from the safe. The second respondent signed an acknowledgment of debt with the appellants acknowledging embezzlement of local currency which he converted to about US$128 000.000. Pursuant to the acknowledgment, the appellants' law firm embarked on a process of recovering its pilfered trust funds through the removal and or attachment of the

second respondent's immovable and movable property as well as cash including US$57 000.00 recovered from its safe. The appellants decided to withhold the money which the first respondent claimed as belonging to its trust fund which had been placed in the possession of the second respondent for lack of a strong room on their part. The appellant withheld the money on the basis that the second respondent signed an acknowledgment of debt thus signalling a creditor and debtor relationship. The appellants claimed that they were entitled to exercise a right of lien over the US$57 000.00 until such a time as they would have recovered the whole amount embezzled by the second respondent.

Further to that, the appellants claimed the right to set off the said amounts with whatever was salvaged from the second respondent. The first respondent was irked by the suggested lien and set-off as they argued that they had shown that US$57 000.00 belonged to their client.

There was continuous engagement and discourse between the appellants' law firm and the first respondent culminating in a letter to the Law Society, written by the appellants. The intonation of the letter made it clear that the appellants maintained that they have both the right of lien and set off over money placed in their safe without their knowledge and or authorisation. They stressed that they had no relationship with the first respondent but the second respondent. The appellants stated that the first respondent's cause of action lay against the second respondent and not them. This stance by the appellants prompted the first respondent to approach the court *a quo.*

PROCEEDINGS OF THE COURT *A QUO*

On 11 April 2022, the first respondent filed an urgent chamber application against the appellants and the second respondent seeking an order that the US$57 000.00 be deposited

with the Registrar of the High Court, or alternatively, that the appellants and the second respondent be interdicted from utilising or dissipating the money. The order sought from the court *a quo* was couched as follows:

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

(1) The Registrar is ordered to release USD$57 000.00 (fifty seven thousand United States dollars) surrendered by the respondents further to the provisional order granted to the applicant on …… 2022 to the applicants forthwith (*sic*).
(2) Alternatively the respondents jointly and severally, the one paying for the others to be absolved, be and hereby ordered (*sic*) to pay to the applicant US$57 000.00 (fifty seven thousand United States Dollars.)
(3) The respondent who is opposed to the application shall pay costs of the application on an attorney and client scale and do so jointly and severally, the one paying the others to be absolved.

INTERIM RELIEF SOUGHT

(1) That the respondent shall deposit hard currency US$57 000.00 (fifty seven thousand United States Dollars) with the Registrar of the High Court within 24 hours of an order of this Court, and the Registrar shall keep the funds secure pending the return day.
(2) Alternatively, that the respondents be interdicted from utilising or dissipating US$57 000.00 (fifty seven thousand United States Dollars) found in their strong room."

The application was vehemently opposed by the appellants who raised several points *in limine* and also argued on the merits, that the respondent had not satisfied the requirements of an anti-dissipation interdict. The appellants argued that there was no relationship between themselves and the first respondent and as such the first respondent had no cause of action against them.

The first respondent maintained that it had established all the requirements of an interdict. It abandoned the main relif and stood on the alternative. The court *a quo* having dismissed the points *in limine* raised by the appellants made a determination on the merits. It

agreed with the respondents that the requirements of an anti-dissipation interdict had been met and that the appellants could not set off a debt between themselves and second respondent using money belonging to a third party. The court *a quo* thus granted the application in the alternative in favour of the first respondent.

Aggrieved by the court *a quo's* determination the appellants launched the present appeal on 9 grounds. At the hearing counsel for the first respondent, Mr *Mubaiwa* successfully impugned grounds 1 and 8. He argued that both grounds were invalid in that they were not concise but conspicuous for being vague as they did not articulate the error on the part of the court *a quo.* We agreed with Mr *Mubaiwa* and thus struck out grounds 1 and 8.

The parties further argued on the attendance status of the second respondent *a quo.* It appears from the record that the second respondent was never part of the proceedings *a quo*. The opposing affidavit by the second respondent was irregularly filed as it was not served on the appellant. It is our finding that the second respondent did not participate in proceedings *a quo* and there is no proof of service of opposing papers by the second respondent on the appellants. As such there is no legal basis for relying on irregularly filed process. The second respondent is equally not party to the present appeal proceedings.

The nine grounds of appeal as discerned from the record of proceedings are set out below. Grounds 1 and 8 were struck off as outlined earlier.

GROUNDS OF APPEAL

1. The court *a quo* erred and misdirected itself in characterisation of the appellants' points *in limine.*
2. The court *a quo* further erred and misdirected itself when it dismissed the point *in limine* that the first respondent had no cause of action as against the appellants when regard is had to the fact that no recognisable legal cause of action was pleaded against the appellants.
3. The court *a quo* further erred and misdirected itself when it held that the first respondent had established a *prima facie* right based on the second respondent's opposing affidavit to the effect that the money belonged to the first respondent when in fact the second respondent did not file any opposing or other affidavit in the court *a quo.*
4. The court *a quo* erred and misdirected itself when it held that the first respondent had satisfied the requirement of a well-grounded fear of irreparable harm when there was no proof or evidence that the appellants had exercised the right to set off as against the second respondent.
5. The court *a quo* further erred and misdirected itself when it found that there was no alternative remedies available to the first respondent on the basis that the second respondent is a pauper when such finding was not supported by any evidential averments in the first respondent's founding affidavit.
6. The court *a quo* further erred and misdirected itself when it found that the first respondent has no alternative remedies and would suffer irreparable harm when it remains available to the first respondent to sue the appellants for damages if the first respondent believes it has a valid cause of action against the appellants.
7. Without having found that the first respondent has a valid cause of action as against the appellants, the court *a quo* erred and misdirected itself when it found that the

appellants cannot exercise a debtor and creditor lien or a right to set off against the second respondent.

8. Having found that the money had been left in the custody of the clerk without the knowledge and consent of the appellant, the court *a quo* erred in granting the relief that it did.
9. The court *a quo* further erred and misdirected itself when it granted a final interdict as interim relief when there are no proceedings pending determination between the appellants and the first respondent.

SUBMISSIONS BEFORE THIS COURT

Miss *Mahere,* for the appellants submitted that the first respondent had no basis for seeking an interdict against the appellants as it never gave any money for safe keeping to the appellants. She submitted that failure by the first respondent to establish the legal basis of its claim rendered the application meritless. She further submitted that the first respondent failed to establish the requirements for an interdict, that is, a *prima facie* right, a well grounded fear of irreparable harm or injury, absence of any other remedy and that the balance of convenience favoured it. Concerning the *prima facie* right, she submitted that the first respondent failed to show the legal right which constituted the cause of action as there was no relationship between the appellants' firm and the first respondent. It was contended that there was no *prima facie* right established by the first respondent. In respect of fear of suffering irreparable harm or injury she submitted that this was not real since the first respondent had transacted with the second respondent and as such it was open for the first respondent to claim from the second respondent. She further contended that there was therefore available, other satisfactory remedies. She averred that the requirements for an interdict were not established,

as such the court *a quo* ought not to have granted the interdict. Ms *Mahere* further submitted that the relief granted by the court *a quo* was incompetent because the main relief that the first respondent had sought on the papers was abandoned and the alternative relief was granted. The grant of the alternative relief meant that the court *a quo* granted a final order on a *prima facie* basis and there would be no return date.

Per contra, counsel for the first respondent Mr *Mubaiwa,* submitted that the matter before the court *a quo* had to be adjudged on the basis of a *prima facie* right. He submitted that Form 26A of r 60 subrule 11 of the High Court Rules 2021 dispensed with the need to provide a return date. He further submitted that the court *a quo* competently confined itself to what it could effectively deal with and correctly granted the anti-dissipating order. He submitted that the US$57 000.00 belonged to the first respondent and was not included in the US$128 000.00 which the second respondent admitted to have stolen from the appellants. He further contended that the appellants could not exercise a lien and set off over the US$57 000.00 as the money was not theirs.

ISSUE FOR DETERMINATION

The grounds of appeal raise a single issue for determination, that is, whether or not the court *a quo* erred in granting an interdict in favour of the first respondent.

THE LAW

It is trite that a party seeking interim relief must satisfy certain requirements prior to the relief being granted. The requirements for granting an interim interdict are well settled and ably set out in case law within and without this jurisdiction. The *locus classicus, Setlogelo v Setlogelo* 1914 AD 221 at 227 spells out the requirements as follows:

"i. a prima facie right, even if it is open to some doubt;
ii. a well-grounded apprehension of irreparable harm if the relief is not granted;
iii. that the balance of convenience favours the granting of an interim interdict;
iv. that there is no other satisfactory remedy."

This Court in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors* 2004 (1) ZLR 511 (S) at 517 C – E succinctly outlined the aforementioned requirements and stated the following on interim interdicts:

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however requirements which an applicant for interim relief must satisfy before it can be granted. In *LF Boshoff Investment (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 C at 267 A – F CORBETT J (as then he was) said an applicant for such temporary relief must show:
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> '(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established though open to some doubt;
> (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy.'"

Herbstein and Van Winsen in their book, The Civil Practice of the High Courts of South Africa 5th ed 2009 Vol 2 at p 1455 described an interim interdict, which is also referred to as an interlocutory or temporary interdict on an interdict *pendente lite*, as one that is sought pending the outcome of proceedings between parties. Its primary purpose is normally to preserve or establish the *status quo* pending the final determination of the rights of the parties. They described an interdict as a summary court order, by which a party is ordered to do or stop doing something to prevent the infringement of a certain right.

It is settled that all the requirements of an interdict must be satisfied before the court grants the order. This is espoused in cases cited earlier and also in *Econet Wireless Holdings v Minister of Finance & Ors* 2001 (1) ZLR 373 S at 375.

The law on what constitutes cause of action is clear. The import of "cause of action" has been elucidated in the case of *Nan Brooker v Mudhanda and Registrar of Deeds* SC 5/18 where the following pronouncement was made at p 4

> "What constitutes cause of action was described in *Abrahams & Sons v SA Railways & Harbours* 1933 CFP 626 at 637 where WATERMEYER J stated:
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> > " 'The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration to disclose a cause of action.' " (Underlining my emphasis)

See also *Pebbles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 4 in which cause of action is defined as "simply a factual situation the existence of which entitles one person to obtain from the courts a remedy against another person."

APPLICATION OF THE LAW TO THE FACTS.

What is to be determined in the present matter is whether or not the first respondent established the requirements of the interdict which they sought *a quo*. The appellants' counsel submitted that there was no factual situation that existed that entitled the first respondent to seek the relief that it sought against them. There was no cause of action established in the founding affidavit. The submissions made by the appellants that the first respondent failed to show that it had a *prima facie* right in the circumstances finds favour with the court since the latter did not demonstrate the legal right which gave rise to the cause of action which it had brought before the court *a quo*. The first respondent's documents *a quo* did not disclose the exact cause of action which the appellants had to answer to. There was no relationship between the first respondent and the appellants as the first respondent had transacted with the second respondent without the knowledge and consent of the appellants. In the absence of a cause of action, the first respondent could not satisfactorily meet the requirement of a *prima facie* right.

Further, considering that there was no relationship that existed between the appellants and the first respondent the balance of convenience would not favour the granting of an interdict against the appellants. The balance of convenience which is determined by weighing the prejudice to the first respondent if the interim relief was refused against prejudice to the appellants if it was granted, does not in the present case favour the grant of the interdict. This is more so, considering that the first respondent's remedy lay in it claiming from the second respondent with whom it had transacted without the appellant's knowledge and consent.

In any case, money found in possession of a person is presumed to belong to that person. That presumption was not rebutted in favour of the first respondent. The money was found in the appellants' safe, allegedly having been placed there by the second respondent. In that case, the money either belongs to the appellants or second respondent, with the first respondent having no stake in the dispute.

DISPOSITION

The first respondent did not satisfy all the essential requirements for an interim interdict. To that extent therefore, the requirements not having been established, there was no basis to warrant the granting of an interim interdict, let alone the granting of a final order on a *prima facie* basis. Granting an interdict in the absence of all the settled requirements constitutes a misdirection on the part of the court *a quo* warranting interference by this Court. Consequently, the appeal must succeed.

Regarding costs, they are in the discretion of the Court. It is the normal trend that costs follow the result.

Accordingly it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with following:

   "The application be and is hereby dismissed with costs."

BHUNU JA: I agree

MUSAKWA JA: I agree

Mtetwa & Nyambirai, appellants' legal practitioners

Rugwandi & Rujuwa, 1st respondents' legal practitioners