ZEDIAS NENE
versus
AARON MHUNGU
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 MAY 2018 AND 7 JUNE 2018

Opposed Matter

I Mafirakureva for the applicant
C Bare for the respondents

MOYO J: This is an application for an order that:

1) The first respondent be and is hereby interdicted from carrying any mining activities on Cyprus 1 2256 BM, Cyprus 2 2257BM and Cyprus 3 2258 BM, located at Chakati, Kadoma pending the finalization of the matter under HC 2493/17.
2. That the applicant be granted vacant occupation of the mining claims stated in paragraph (1) above.
3. That first respondent pays the costs of suit at an attorney and client scale.

The first respondent opposed the order sought and raised a point *in limine* that the matter is *res judicata* as a similar application was dismissed by the magistrate's court. At the magistrate's court, applicant had filed a main suit and then filed an application seeking some interim relief pending the finalization of that application.

I am advised the suit at the magistrate's court and the application were identical in substance to the suit and application before this court.

When the application at the magistrate's court was dismissed, the applicant then withdrew the main matter before the magistrates court.

Applicant then filed a new suit before this court and then filed this application. I hold the view that this matter is not *res judicata* because the subject matter of this application before me

is the pending High Court action which High court action is not *res judicata* because it has not been determined. This application cannot be held to be *res judicata* on the basis that the parties are the same and the subject matter is the same, the contractual dispute, when we are all aware that the magistrate's court application was premised on the suit that was before the magistrate's court. This particular application is premised on the suit that is now before this court. In other words, the application at the magistrate's court did not relate to the High Court suit and could not have so related because the High court suit was then non-existent. As long as this application is ancillary to the pending High Court suit, then it cannot be *res judicata* in my view. The point *in limine* is thus dismissed.

On the merits, the facts of this matter are that the two parties entered into an agreement of sale whose terms and conditions seem to have been fulfilled by neither party. The applicant purchased gold claims from the first respondent for a sum of $37 500-00 with a deposit of 12 250-00 payable forthwith and the balance of $25 250-00 payable in monthly instalments of $12625-00.

The agreement had a clause to the effect that

> "(4) The seller shall deliver and give vacant possession of the mining claims upon payment of a 50% deposit towards the purchase price."

The agreement also had another clause which reads:

> "(5) The purchase shall take possession and ownership of the property upon full payment."

Clause 3 of the agreement of sale also stipulates that

> "failure to adhere to the terms of this agreement shall constitute a breach of contact entitling the seller to cancel the agreement ---."

There is also a clause to the effect that:

> "This agreement constitutes and represents the entire agreement between the two parties."

The applicant paid the deposit in accordance with the agreement of sale. It is the difference that was not paid in accordance with the agreement of sale. The applicant says the terms of the agreement were later altered orally to accommodate the breach. The first respondent disputes this and avers that applicant breached the agreement resulting in him cancelling the

agreement unilaterally. Applicant avers that the cancellation was in violation of the provision of the Contractual Penalties Act [Chapter 8:04].

The sole issue for determination in this matter in my view is whether the applicant has made a case for the relief sought?

The applicant seeks a final interdict to the effect that first respondent be and is hereby interdicted from mining at the mining claims being the subject matter of the agreement of sale pending the finalization of HC 2493/17 and that the applicant be granted vacant possession of the mining claims. Has applicant made a case for that relief in the sense of a final interdict?

I hold not. My reasons are that firstly, for applicant to succeed, he must establish a clear right at this stage. Applicant by his own admission has not adhered to the terms of the agreement of sale being the subject matter of this dispute. He has not paid the dues according to the agreement. He thus cannot be held to have a clear right in my view. The purported oral variation of the contract is a material dispute of fact since first respondent refutes same and the agreement of sale has a clause which provides that it is the entire contact between the parties.

Again, it cannot be held that applicant has made a case for the order he seeks to take occupation of the claims. He cannot seek to enforce the terms of an agreement that he himself has failed to fulfill. He can only wait for his fate in HC 2493/17 and then take it from there. To date the amount due is not paid up so the breach is clearly not in dispute. Applicant cannot seek to enjoy the fruits of a transaction that he himself has not honoured, this will be so, in my view until a court of law defines the parties' rights or entitlements in terms of the "broken deal." Whilst applicant may have a right to challenge the cancellation of the agreement of sale in violation of the Contractual Penalties Act [Chapter 8:04] and whilst that court may, for argument's sake, find in his favour, such prospects no matter how bright, cannot establish a clear right on applicant's case as long as the breach exists. Applicant will only have a clear right after that suit has been finalized in his favour in my view. At this stage, applicant's circumstances do not meet the threshold for a clear right.

Certainly a right cannot be clear where a party is in breach but now seeks to take shield in some legal technicality that may work in his favour.

The requirements for a final interdict were aptly put by SANDURA JA, as he then was, in the case of *Zesa Staff Pension Fund* v *Mashambadzi* SC 57/02. A clear right is the first one to be satisfied amongst the list of four requirements for a final interdict.

I have not bothered to assess whether all the four requirements for a final interdict have been satisfied on a balance of probabilities in this matter as I have already found that the applicant has not established a clear right. That finding alone dispenses with the rest of the requirements hence the application should fail.

The application is accordingly dismissed with costs being in the main cause.

Messrs Moyo and Nyoni, applicant's legal practitioners
Messrs Murambasvina, Tizirai-Chapwanya, 1st respondent's legal practitioners