

IAN PEACOCK  
and  
KELVIN J PEACOCK  
and  
S J MOORE  
and  
JENNIFER PEACOCKE  
and  
THE MESSENGER OF THE COURT GURUVE  
versus  
BRUNIO ANTONIO  
and  
TECKY SANGURUKANI  
and  
SILVER KANGADZI

HIGH COURT OF ZIMBABWE  
MWAYERA & MUNANGATI-MANONGWA JJ  
HARARE, 19 January 2016 & 30 March 2016

**Civil appeal**

Mrs *F P Machine*, for the appellants  
*D C Ngwerume*, for the respondents

MUNANGATI-MANONGWA J: The respondents(applicants in the court *a quo*) being occupiers of property commonly known as stands 20B Omeath Road and Lot 1 Stand 7B Marion Ave Mvurwi, applied for an interdict against the appellants (respondents in the court *a quo*). The court *a quo* granted the interdict in the respondent's favour and barred the appellants from "interfering or coming to the said premises." It is that order that the first, second, third and fourth appellants (herein referred to as appellants) appealed against in this court. The Messenger of Court did not file an appeal and is thus henceforth excluded from reference as an appellant.

On 19 January 2016 this court allowed the appeal with costs indicating that reasons were to follow and these are they. The background facts to this matter are as follows:

The appellants are all siblings who inherited the property aforementioned which is at the centre of this dispute, they hold title thereto since 2010. The respondents were employed,

by a company called Agmech (Pvt) Ltd owned by the appellant's father Mr Peacock. It is the respondents' case that Mr N. Peacock retrenched some of his employees remaining with the respondents. As he could not pay them retrenchment packages he offered that the respondents take over operations including machinery, he moved them from premises where they operated from to one of his properties at No. 20B Omeath Road and advised they did not have to pay rent. The respondents' assert that the now deceased also offered them accommodation at Lot 1 Stand 7B Marion Ave Mvurwi. A document purporting to reflect this state of affairs was placed before the court and the pertinent part reads as follows:

“In the event that I demise before I pay them (respondents) their packages they automatically become the owners of the above mentioned properties”

The document which is dated 17 November 2003 is purported to have been signed by the now late Mr Peacock. The first appellant challenged this document in the court *a quo*.

The respondents in their application in the court *a quo* averred that Mr Peacock their employer died in 2006 not having paid them but owing US\$150 000.00. Their complaint to the court *a quo* arose out of the claim by the appellants that they were the legal owners and had through a court order, evicted them from a house Lot 1 Stand 76 Marion Avenue. The appellants were now claiming ownership of the workshop and had locked doors at the workshop hence the application for an interdict.

It is common cause and *ex facie* the record that after Mr Peacock's death in 2006, Redfern and Mullet had collected rentals from the respondents till June 2010 when the second and third appellants gave instructions that rentals be paid into a personal account of a Dr M.E. Peacock pending the signing of a lease agreement. The respondents did not oblige. The first appellant advised the respondents that he would be collecting cash and as per the respondents, to avoid disruption of their business they started paying the first appellant what he was demanding which was \$300.00 per month. The respondents allege they told him they were going to pursue the matter including the package matter.

In the court *a quo* the first appellant had raised the pertinent issue that his siblings had not been served with copies of the application, and, whilst he had told them of the claim they awaited formal service as they wanted to oppose the application. Further, as the respondents' claim was based on a debt for US\$150 000.00 the court had no jurisdiction. Also as his father's estate had been wound up with respondents not having filed their claim and more than three years had elapsed their claim had prescribed.

Thus when an interdict was granted the appellants filed the following grounds of appeal.

“GROUNDS OF APPEAL

1. The magistrate erred in hearing the application notwithstanding that 2<sup>nd</sup> – 3<sup>rd</sup> appellants, beyond doubt, had not been served with a copy of the application and accordingly had not been provided with notice of their claim for immovable property in which they hold real right interest and accordingly their rights to consider the nature and competence of the claim and to oppose the relief sought was denied.
2. The Magistrate erred in hearing the application given that the immovable property coupled with movable property claimed by respondents as their property exceeded the monetary jurisdiction of the Magistrates Court and ought not to have been entertained.
3. The Magistrate misdirected himself by failing to properly take into account the facts that the immovable property and undisclosed moveable equipment-the subject of respondents claims for a final interdict-was previously owned by the late Norman Forrester Peacocke who died in 2006; that the deceased's Estate had been advertised through the Gazette and newspapers for purposes of lodging of claims by third parties such as respondents, that no claims were furnished by respondents to the Administrators and Executors of the Estate and that accordingly any claim to the ownership, interest or right to immovable property and movable property belonging to Norman Forrester Peacocke had prescribed.
4. The magistrate erred in adjudicating the application to finality and of granting a final interdict against appellants when ex facie the papers filed of record there were clear and irreconcilable factual disputes, including but without limitation an averment of fraud by 1<sup>st</sup> appellant the whole of which required reference to trial for the determination of the aforesaid factual disputes.
5. The magistrate erred in holding that the essential elements necessary to found a final interdict were present and in favour of applicants in the court a quo when clearly these essential elements were absent.”

Basing on the above grounds of appeal, appellants prayed for setting aside of the judgement of the court *a quo*.

At the hearing of the appeal it turned out that the respondents had not filed their heads of argument. We allowed Mr *Ngwerume* for the respondents to make an oral application for upliftment of bar. The application was duly opposed by the appellant's legal practitioners as not having merit. There was no reasonable explanation tendered for the delay in filing the heads and there were no prospects of success on the matter as evidenced by Mr *Ngwerume*'s failure to address us on the requirements. We thus proceeded to hear Mrs *Machine* for the appellants on the merits.

The appellants argued that it was a gross irregularity for the court *a quo* to have proceeded to hear and determine the application in the absence of proof that service was effected on the appellants. Rule 7 Order 7 of the Magistrates Court Rules 1980 clearly provides that

“Where two or more persons are to be served with the same process, service shall be effected upon each of them, except in the case of—  
(a) married persons who are not separated under an order of judicial separation, when service of process relating to property jointly owned or jointly held by them may be effected on either spouse;  
(b) two or more persons sued in their capacities as joint trustees of an insolvent estate, liquidators of a company, executors, curators or guardians, when service may be effected upon any one of them.”

*In casu* service was to be effected upon four persons and only one person was served contrary to the provisions of r 7 quoted above. The second, third, fourth appellants fell outside the exceptions and ought to have been served individually which was not done. There being no proof of service of the application on the second to fourth appellants individually or by registered post as provided for by r 7 A, the magistrate had no right to proceed to hear the matter and make a determination against the stated appellants without hearing them. Their right to be heard and protect their interests which is clearly enshrined in s 69(2) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 was infringed. The purpose of serving court papers on an interested party is to enable that party to exercise their right to make representations before any decision affecting their interests or rights is made. This is what the *audi uli patern* rule is all about. In that regard the appellants' contention that there was a misdirection has merit hence it was upheld.

The appellants' took issue with the jurisdiction of the court and contended that the court *a quo* had no jurisdiction to entertain the matter given the value of the immovable and movable property that the respondents claimed to be theirs. These include two immovable properties and equipment. It is clear from the record that the respondents claim to be owed US\$150 000-00 by the appellants' deceased father and by virtue of his failure to pay, the property became theirs. As the respondents' purported rights derive therefrom, the issue of jurisdiction is pertinent.

Section 11 of the Magistrates Courts Act [*Chapter 7:10*] as read with S.I. 163/12 confers jurisdiction to the magistrate court and places a maximum monetary jurisdiction of \$10 000-00. Section 12 of the Act provides that interdicts are subject to the jurisdiction of magistrates as prescribed by the Act.

From the evidence on record, it can be safely concluded that the respondents' claims are premised at purported ownership which flows from being owed US\$150 000-00. On the other hand the appellants' defence to the interdict centres on the fact that they have real rights to the property. Apart from creating a dispute of fact, this clearly indicates that the value to

the occupier exceeds US\$10 000-00 given the properties in issue. That being so, it was a misdirection on the part of the court *a quo* to hear the matter as it had no jurisdiction or powers to act and determine the matter as it did.

Regarding the manner in which the court *a quo* handled the issue of the winding up of the estate, it is clear as the appellant pointed out that there was a misdirection. The court *a quo*'s finding that the respondents should have been served with papers of winding up of the estate is without merit. Apart from the advertisements which the executor made, evidence on record provided by the respondents themselves show that Redfern and Mullet pointed to the respondents that Scanlen & Holderness were the executors of the estate of the person who owned the properties they occupied. The respondents had not lodged any claims with the Executors and the estate having been wound up the respondents could not at this forum challenge the appellants who were now the title holders. The finding that the respondents "have a clear right over the property and hold an authority from the late Mr Peacock" was clearly a misdirection.

The appellants pointed out that there were irreconcilable factual disputes in the face of which the court *a quo* could not grant a final interdict. The assertion that the respondents were owed US\$150 00-00 was disputed as there was no evidence proving same. The document purportedly written by the late Mr Peacock granting rights to property was challenged as a fraud by the first appellant. As stated by Makarau J in *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH 92/09 at p 4:

"A material dispute of fact arises when such material facts put by the applicant are disputed and transversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence".

The facts *in casu* certainly created material dispute of facts and a finding that the respondents had a clear right over the property could not be reached without hearing evidence. At that juncture the court had no ready answer to the dispute between the parties. It was at quandary as to who to find for. Further, we observed from the purported document by Mr Peacock that the rights thereto were suspensive. Apart from not stating the amount owed (which amount now emanated from the respondents), it stated that "in the event that I demise before I pay them their packages they automatically become the owners of the above mentioned properties". This therefore means, respondents had to prove that at the time of death they had not been paid their dues. Thus in the absence of evidence on the amount owed, in the absence of evidence that respondents were not paid, and in the face of the challenge by

first appellant of the authenticity of the document it was not legally proper to proceed by way of application. Faced with conflicting evidence regarding the rights to the property, it was imperative that the matter be referred to trial for proper ventilation of the evidence, more so when a final interdict was being sought. The appellants' contention was therefore legally sound and meritorious and hence was upheld.

Finally it was the appellants' contention that the finding by the court *a quo* that essential elements necessary for the granting of an interdict were present was a misdirection. It was submitted on behalf of appellants that there was evidence of irreparable harm that would arise from the appellants visiting the property which they hold title to. Irreparable harm is that type of harm that cannot be corrected or remedied through monetary compensation or where the *status quo* cannot be restored once harm is occasioned. The magistrate in the court *a quo* simply indicated in his judgment that the respondents would suffer irreparable harm if the interdict is not granted 'because they use the property for their family gain.' This is not sufficient. The prejudice has to be far reaching and beyond measure such that even monetary compensation will not suffice nor will reversion to the original state be possible. The respondents on their part had simply averred that irreparable harm will be occasioned by the fact that 'that is where their business is'. Clearly the respondents are not paying rent for their occupation. They do not hold title to the premises, they are not losing anything if anything, the loss is lying with the title holders the appellants. The hardship lies with the appellants.

Equally the finding that respondents had no other remedy available to them apart from the interdict was misplaced. Clearly from the facts since the respondents were claiming that they were granted the rights to ownership by the appellants' late father they could still approach the courts to assert their rights. The respondents' remedy do not lie in barring registered owners from visiting their legally acquired property. Preventing the appellants from accessing their property amounts to constructive eviction.

It is due to the foregoing that this court found that the appeal had merit and accordingly granted the appeal with costs.

MWAYERA J agrees .....

*Gollop & Blank*, appellants' legal practitioners

*Hamunakwadi, Nyandoro & Nyambuya*, respondents' legal practitioners