

TURNOVER MAJABVU
versus
TAFADZWA MAJABVU

HIGH COURT OF ZIMBABWE
MAKONI AND CHITAKUNYE JJ
HARARE, 31 May 2016

Civil appeal

M C Maramba for appellant
Respondent in person

CHITAKUNYE J: This is an appeal against the decision of the magistrate in granting the respondent's prayer at the pre-trial conference stage.

The basic facts are that the respondent sued for the eviction of appellant from house number N196 Ngoni, Norton. The appellant duly filed his plea. Pleadings were closed and the matter was set for a pre-trial conference.

On 24 November 2015 parties appeared before a magistrate for a pre-trial conference. At the end of the pre-trial conference the presiding magistrate granted judgement in favour of the respondent even though the parties had not reached consensus. The magistrate ordered the eviction of the appellant despite his resistance.

The appellant was dissatisfied with the magistrate's decision and thus launched this appeal. In his notice of appeal the appellant raised 8 grounds of appeal.

Upon perusal of the record of proceedings and hearing arguments I was of the view that only the first two grounds were relevant to dispose of the matter. The other grounds pertained to matters that were still to be determined on the merits.

The first two grounds of appeal were that:

1. The court *a quo* erred in disposing of the contested matter at the pre-trial conference stage when the Rules of the court *a quo* did not provide for the disposal of any matter at pre-trial conference stage in any manner other than by way of either a deed of settlement or a consent judgment drawn up by the parties and filed as evidence of a matter's conclusion.

2. The court *a quo* erred in disposing of the matter at pre-trial conference stage when the issues and pleadings of the appellant and the respondent were not *ad idem* and the matter could not be dealt with on the papers.

The issue for determination before this court was whether the magistrate misdirected himself in determining the matter at the pre-trial conference stage as he did when then parties themselves had not settled their dispute.

In *Doelcam (Pvt) Ltd v Pichanick & Others* 1999 (1) ZLR 390(H) @ 397C-E GILLESPIE J aptly stated the purposes of a pre-trial conference as follows:-

“A pre-trial conference has a two-fold purpose. The primary aim is to assist towards the resolution of a dispute without recourse to trial.The secondary aim, in the event that settlement is not achieved, is to ensure that all pleadings and pre-trial procedures are complete and correct; that the issues are limited to the greatest extent achievable and properly defined; and that the case is ready for trial on the merits without further ado.”

Order 19 of the Magistrates Court (Civil) Rules 1980, as amended, makes the above abundantly clear. Order 19 r 1 (2) states that: -

“At the pre-trial conference the parties shall attempt to reach agreement on possible ways of expediting or curtailing the duration of the trial and in particular as to all or any of the following matters—

- (a) The obtaining admission of fact and of documents;
- (b) The holding of any inspection or examination;
- (c) The exchange of reports of experts;
- (d) The making of any discovery of documents;
- (e) the giving of any further particulars reasonably required for the purpose of trial;
- (f) the plans, diagrams, photographs, models, and the like, to be used at the trial;
- (g) the consolidation of trials;
- (h) the quantum of damages;
- (i) the definition of the real issues and the manner in which any particular issue may be proved;
- (j) an estimation of the probable duration of the trial;
- (k) the preparation of correspondence and other documents to be handed in at the trial in the form of a paged bundle with copies for the court and all parties;

and, if it is practicable to do so, the parties shall attempt to reach a settlement of all or any of the matters in dispute between them.”

Rule1 subrule (4) empowers a magistrate to convene a pre-trial conference of the parties with the object of reaching agreement on or settling the matters referred to in subrule (2).

Subrule (10) thereof then provides that:

“Upon the conclusion of a pre-trial conference held before a magistrate, the Magistrate-

- (a) shall record any decisions taken at the conference and any agreements reached by the parties as to the matters to be considered; and
- (b) may make an order limiting the issues for trial to those not disposed of by admissions or agreement; and
- (c) may give directions as to any matter referred to in subrule(2) upon which the parties have been unable to agree; and
- (d) shall record the refusal of any party to make an admission or reach agreement, together with the reasons therefor.”

It is very clear that at the pre-conference stage the issue of settlement by the parties through consensus is very important. It is an aspect that cannot be forced on the parties. Where the parties are not able to reach settlement on all the disputed aspects of the matter, a magistrate has no discretion but to refer the disputed matters to trial. Even where, after explaining the law and how the law is likely to be applied by the trial court given the facts of the case, the parties still do not reach settlement, a magistrate cannot impose his decision on the merits on the parties but has to refer the matter to trial.

It is thus a misdirection for a magistrate to make a determination on the merits and dispose of the matter at the pre-trial conference stage when the parties have not reached settlement and are desirous of contesting the outstanding issues in a trial.

In casu, I am of the view that the misdirection was such that the determination by the magistrate cannot stand. The matter will be remitted to the magistrate court for a proper pre-trial conference to be held after which the matter may be referred to trial depending on the outcome of such conference.

Accordingly the appeal is hereby upheld.

1. The court *a quo*'s decision is hereby set aside.
2. The matter is hereby remitted to the magistrate court for the holding of a pre-trial conference and thereafter to proceed in terms of the Magistrates' Court (Civil) Rules 1980.

MAKONI J agrees

Maposa Ndomene, Maramba Legal practitioners, appellant's legal practitioners.