MICHAEL PETER HITSCHMANN

versus

BANWELL MWAREHWA

and

FREDERICK CHIRIPAMBERI

and

CITY OF MUTARE

HIGH COURT OF ZIMBABWE

CHITAKUNYE & NDEWERE JJ

HARARE, 15 September 2016 and 9 February 2017

**Civil Appeal**

*T Maanda*, for the appellant

*E. T Machie*, for the 1st respondent

*D Sananga*, for the 3rd respondent

NDEWERE J: On 2 September 2014 and 18 December, 2014, the appellant approached the third respondent and expressed an interest to buy an infill piece of land near Cecil Kopje in order to build a house for his son. The third respondent replied on 19 February, 2015 and indicated that the land in question was a public open space and could not be a residential stand. At a later stage, the third respondent sold the piece of land to the first and second respondent plus six other persons who were not party to the proceedings before the court *a quo*.

When he realised that the land had been sold to other persons, the applicant wrote to the third respondent on 21 September, 2015, demanding, within 14 days,

1. the Council resolution which converted the property from a public open space to a residential stand
2. the application by the purchasers
3. the criteria used to select the purchasers
4. written reasons why the appellant was not offered the land or advised that the land was now available for sale.

The appellant did not get the information he demanded within 14 days.

In October, 2015, he filed an application for an interdict in Mutare Magistrates Court, to stop the first and second respondents from effecting any developments interfering with the flora and fauna pending a finding on the lawfulness of the disposition of the disputed land while the third respondent was to be interdicted from approving any plans, granting any licences or selling any further land on the disputed piece of land. A rule *nisi* was granted as temporary relief on 20 October, 2015. On 28 October, 2015, the first respondent filed opposing papers. After hearing submissions from all the parties, the application was dismissed on 24 December, 2015.

The appellant noted an appeal in January 2016. His grounds of appeal were as follows:

1. The learned magistrate grossly erred in holding that the appellant had failed to establish a *prima facie* right against the respondents when he had clearly done so.
2. Further, the learned magistrate grossly misdirected herself in awarding punitive costs against the appellant in relation to the first and second respondents on the basis that there were other beneficiaries of the land who were not cited by the appellant.

After hearing arguments from all the parties in this case, our view was that the learned magistrate did not misdirect herself in any way.

On 16 October, 2015, the appellant filed a court application with the High Court against the City of Mutare and its Town Clerk as the first and second respondent respectively, HC 1823/15. The relief he sought in the application was for the City of Mutare and the Town Clerk to furnish him, within 14 days,

“With the record and all documents relating to the sale and alienation of a piece of land ordinarily described as ‘an infill area bordering Arcadia Road to the South, Murambi Road to the East, Cecil Kopje Nature Reserve to the North and in the East the access road from Arcadia Road up to the Cecil Kopje Nature Park.”

Thereafter, the appellant filed the application for interdict in the Mutare Magistrates Court. The relief he sought in the interdict application was for Mr Banwell Mwarewa and Frederick Chiripamberi, as the first and second respondents, to be interdicted from “effecting any developments of interfering with the land referred to as an infill bordering Arcadia Road to the South, Murambi East to the West Cecil Kop Nature Reserve to the North and in the East the access road from Arcadia Road up to Cecil Kop Nature Park, including, but not limited to desisting from cutting down trees, earth moving, erecting structures, digging, fencing, taking or moving or interfering with any flora and fauna therein, pending the finding of the High Court on the lawfulness of the disposition of the above mentioned land.”

The third respondent, being the City of Mutare, was to be “interdicted from approving any plans, granting any licenses, or selling any further land in respect of the land described in the paragraph above, pending the finding of the High Court on the lawfulness of the disposition of the above mentioned land.”

As correctly pointed out by the third respondent in its submissions, the purpose of an interim interdict is to interdict a party from doing a certain act pending conclusion of litigation which has already ensued. That litigation ought to have started already, it should not be in the future. This was obviously not the case because the application in the HIGH COURT which was pending had nothing to do with the first and second respondents in the Mutare interdict application. The High Court application was a generalised application for “all documents” pertaining to a larger piece of land and not the specific pieces of land occupied by the first and second respondents in the Mutare interdict application. The first and second respondents in the Mutare interdict application were not parties in the “pending” High Court application. To make matters worse, the relief sought in the High Court application was not for a finding by the High Court on the lawfulness of the disposition of the first and second respondents’ pieces of land. So how could the magistrate have confirmed such an interdict where it appeared as if the appellant was on a fishing expedition for information from other respondents; yet was already seeking to interdict the first and second respondents only on the basis of information not yet received. As correctly decided in *Makoni* v *Makoni and Another*, HH 820/15, if the litigation relied upon in the application to interdict has not commenced, then an interim interdict cannot be granted as the reason for seeking the interdict will not exist.

The appellant sought an interim interdict pending determination of the lawfulness of the disposal of land by the third respondent; yet no application to determine the lawfulness of the disposal was before the High Court as yet. Without an application for the determination of the lawfulness of the disposal of the land in question, the appellant had no right to interdict the first and second respondents from continuing with their activities on the land in question.

The same principle applies to the third respondent. There is no direct connection between the right to information from the City of Mutare and interdicting the third respondent from carrying on with its day to day work of disposing land and approving developments.

The fact that there is no pending application for the lawfulness or otherwise of the disposal means the application to interdict the third respondent is premature. It cannot succeed when there is no pending application on the lawfulness or otherwise of the city’s activities.

The requirements of an interdict were summarised as follows in *Airfield Investment (Pvt) Ltd* v *Minister of Lands & Others*, 2004 ZLR 511 at 517:

“There are, however, requirements which an application for interim relief must satisfy before it can be granted …… an application for such temporary relief must show,

1. that the right which is the subject matter of the main action which he seeks to protect by means of an interim relief is clear or if not clear, is *prima facie* established……”

This shows that there is need for a definite connection between the right in the main matter which he seeks to protect and the activity which is being interdicted. That is not the case in the current case.

The second requirement is that of apprehension of irreparable harm. There is no such apprehension because appellant stands to lose nothing. He offered to buy the land and his offer was rejected. He accepted the City’s decision. In fact, on p 73 of the record, the appellant says he is not seeking to purchase the land in question, but administrative justice. So his interest is just an academic interest. The first and second respondents applied and were successful. In addition, it is common cause that six other persons whom the appellant left out as respondents had also obtained pieces of land from the disputed area. Consequently, no irreparable harm would befall the appellant if the interdict is not granted because it is common cause that there are six other beneficiaries who would carry on with their developments despite the appellant’s court application against the first and second respondents.

The third requirement is the balance of convenience and in this case the balance of convenience favoured the two respondents who applied for land alongside six others, succeeded, paid and began to develop their pieces of land. These are the people who would be prejudiced if the interdict were to be granted, yet they are innocent buyers trying to fulfil their right to shelter.

On whether the appellant had an alternative remedy, our view is that the appellant had the alternative remedy of exhausting the domestic remedies of Mutare City to access the information he required from the City of Mutare and establishing the facts about the disposal of the land before dragging the respondents to court and prejudicing them through issuance of the rule nisi.

On the issue of costs, the appellant ought to have investigated first and established all the facts before interdicting the first and second respondents. Why interdict two people only when there were six others? The unnecessary inconvenience caused to the first and second respondents under these circumstances is the reason why the court *a quo* awarded costs to first and second respondents on an attorney and client scale.

In our view the magistrate exercised her discretion properly by awarding the punitive costs, in favour of the first and second respondents. We have no basis to interfere with her decision.

The appeal is therefore dismissed with costs.

CHITAKUNYE J agrees \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Maunga Maanda & Associates*, appellant’s legal practitioners

*Gonese& Ndlovu*, 1st respondent’s legal practitioners