HMT 59-21
CIV 'A' 31/20
REF 101/20

TRUSTEES OF THE ANGLICAN DIOCESE OF MANICALAND
CHURCH OF THE PROVINCE OF CENTRAL AFRICA
versus
GILBERT T. SAMBONA

HIGH COURT OF ZIMBABWE
MUZENDA & WAMAMBO JJ
MUTARE, 15 September 2021

Civil Appeal- Reasons for Judgment

A. Mutungura, for the Appellant
M.C. Gwizo, for the Respondent

MUZENDA J: This is an appeal against the entire decision of the Provincial Magistrate sitting at Mutare on 16 October 2020 where the court dismissed an application for an interdict brought by the applicant in the court *a quo*. The appeal is opposed.

The grounds of appeal are as follows:

(i) The Learned Magistrate erred both in law and in fact in failing to recognise that appellant has a clear right.

(ii) The Learned Magistrate grossly erred in finding that appellant's averments are not substantiated by any evidence when the respondent conceded the appellant's averments.

(iii) The court *a quo* erred and misdirected itself and did not take cognizance of the Canon Law position that the decision of the Bishop is final in terms of Canon 16.2 of the Constitution and Canons of the Church of the Province of Central Africa.

WHEREFORE, the appellant prays that the appeal be allowed and the decision of the court *a quo* be set aside and substituted with the following:

(i) The respondent be and is hereby interdicted from exercising any ecclesiastical functions without a valid licence.

(ii) The respondent pays costs.

Background facts

On 14 February 2020, the appellant brought an *ex-parte* application for an interdict in the court *a quo* seeking an order interdicting the respondent, his agents or assignees and all those claiming through him from entering Zimunya Chapelry and any other Parish attending services or any other activities or performing any acts or activities for and on behalf of the appellant and interfering, harassing, threatening the worship of congregants at All Saints Zimunya Chapelry which covers Gombakomba, Holy Cross Machembere and surrounding churches and any other Parish and the Anglican Communion Worldwide. The respondent went on to contend that the number of congregants has increased and the problem was that the appellant's bishop had a personal crusade against the respondent.

Appellant (applicant in the lower court) submitted before the court of first instance that it had met all the requirements of an interdict. It argued that it had a clear right, that respondent had been interfering, harassing and threatening the worship of the congregants at All Saints Zimunya Chapelry. Appellant added that applicant will suffer irreparable harm if the respondent is not interdicted for the respondent did not hold a licence to exercise any ecclesiastical functions in any of applicant's property.

Respondent submitted in the court *a quo* that a prohibitory interdict is an order made by a court prohibiting a particular act for the purpose of enforcing a legally enforceable right which is threatened by the anticipated harm. Hence in order to succeed, applicant must establish a clear right, an injury actually committed or reasonable apprehended and the absence of similar protection by other ordinary means. The respondent concluded by submitting that applicant had failed to establish that an injury had been committed or is reasonably apprehended. Respondent contended further that appellant's allegations of interference are unsubstantiated. It prayed for the dismissal of the application and discharge of the provisional order.

Court *a quo*'s decision

After hearing the parties the court *a quo* in its judgment outlined the requirements of both the final and temporary interdict. Applying the law to the facts placed before it, the court *a quo* concluded that neither a clear right nor a *prima facie* right had been established by the appellant. It also came to a conclusion that the decision of the appellant revoking respondent's license was appealed against and in view of the court *a quo*, the propriety or otherwise of the appeal was not its business but reposed with a different tribunal which was going to hear the appeal. The court *a quo* went on to make a finding that the affidavit filed on behalf of the

applicant/appellant relating to the cause of action was not materialised by any tangible evidence, direct or otherwise nor supporting affidavits to confirm that is what was stated on behalf of the appellant had actually happened or happening or is likely to happen. To the court *a quo* the averments were the figment of the deponent's imagination, hence to the mind of the court *a quo* unconfirmed and unsubstantiated fears could not form the basis for an interdict. The court *a quo* further concluded that there was dearth of evidence placed before it to prove that injury had actually been committed or that it was reasonably apprehended. It went on to dismiss the application with costs. The appellant was not satisfied with the dismissal of the application and proceeded to appeal against the decision of the court a *quo* hence this appeal.

Parties' Submission

Appellant's heads reiterate the requirements of a final interdict that applicant must establish a clear right, element of irreparable harm actually committed or reasonably apprehended and the absence of an alternative remedy.[1] *In casu*, it was submitted on behalf of the appellant the right to interdict the respondent from exercising any ecclesiastical functions without a valid licence was to the appellant a right which is protected by common law. Appellant also submitted that it had a clear right to the immovable property in question and appellant had at all material times been in possession of that Diocesan property and respondent has no lawful authority to be at appellant's property for the purposes of conducting church services. To the appellant, there are reasonable apprehensions that its rights will be detrimentally affected if the interdict is not granted because the respondent might cause confusion and turmoil within the congregants at the centres specified in the application.

In terms of the appellant's Canon Law, there is no appeal which is pending. Appellant's Bishops revocation of the respondent's licence is final and general courts have no role in the matters of faith and appellant urged this court to uphold the appeal with costs.

The respondent in his heads of argument raised preliminary points and impugned the appellant's grounds of appeal as being not clear and concise and as being basically vague and embarrassing and prayed that grounds of appeal 1 and 2 be expunged and submitted that the appeal be heard with respect to ground number 3. However on the date of hearing respondent abandoned the preliminary points and applied to have *points in limine* withdrawn.

On the merits, the respondent submitted that the requirements of a final interdict as spelt out by the appellant in its heads were not met by the appellant. To the respondent the notice of

[1] Fred Marere v Mukwazi HH 462/19

appeal suspended the operation of the revocation of the licence by the appellant's bishop. Canon 26 gives the respondent the right to appeal. Canon 16 (2) should be read together with Canon 27 (4), it was submitted on behalf of the respondent, hence in light of Canon 26, the decision of the Commission which sat as a diocesan court was thus appealable in respondent's view.

Respondent went on to submit that the court *a quo* did not err in finding that there was no evidence placed before it on the aspect of injury actually committed by respondent or reasonably apprehended moreso there was no evidence adduced by the appellant that respondent was conducting himself in a way to cause commotion. The onus was on the appellant to prove the grounds for the remedy being sought[2]. Appellant's averments were just bold allegation devoid of supporting facts. Appellant had also failed to demonstrate that the clear rights of the appellant had been interfered with, it was submitted. It was a further contention of the respondent that irreparable harm should be particularised such that its magnitude would be appreciated[3] and in this case appellant failed to discharge that onus. Respondent prayed that the appeal be dismissed with costs.

The Law

Both parties eloquently defined the law applicable to the genre of interdicts, both interlocutory as well as final. To obtain an interlocutory interdict, including an interdict *pendente lite*, the applicant must establish (1) a clear right and show an infringement of his right by the respondent or at least a well-grounded apprehension of such an infringement and (2) the absence of any other satisfactory remedy, he should in addition prove that the balance of convenience favours the granting of an interlocutory interdict though where he can establish a clear right together with the 2 above, that is a clear right and absence of other satisfactory remedy applicant would normally claim a final interdict.[4]

The court has to decide in its discretion whether or not to grant a temporary interdict. In the exercise of this discretion, it must be satisfied that the applicant has proved an actual or well-grounded apprehension of irreparable loss if no interdict is granted and it must have regard to the balance of convenience. The balance of convenience however becomes relevant only

[2] Book v Davidson 1988 (1) ZLR 365 per DUMBUTSHENA CJ
[3] Rupande v Grobbler and 2 Others HH 2/19
[4] Mabhadho Irrigation Group v Kadye and Others HB 8/03 per Ndou J. Also Genzel Mining (Private) Limited v J. Mpofu and 2 Others Hb 239/18 per Takuva J

when a *prima facie* ground for an interdict has been established. This is the threshold that must be crossed and failure to do so means that an applicant cannot succeed in his claim.[5]

Where the court *a quo* exercised its discretion an appeal court does not lightly interfere with that court's discretion unless the discretion was not judicially exercised. That is the general rule.[6]

Analysis of the case

Most facts are not in dispute in this appeal and the submission made by the parties before this court were basically the same before the court *a quo*. It is not disputed by the appellant that there are no supporting affidavits from the congregants to show the conduct of the respondent in support of the application for an interdict. It is not also not disputed that the appellant approached the Magistrates Court seeking an interlocutory interdict and on the return date the learned Magistrate decided that the appellant had failed to meet the requirements of an interdict and using his discretion dismissed the application. The appellant in the appeal before us has failed to prove where the court a quo failed to properly exercise its discretion to justify an appeal court's interference with its decision. We are satisfied that the appeal has no merit and it ought to be dismissed in its entirety.

Disposition

The appeal is dismissed with costs.

WAMAMBO J agrees_____

Mutungura & Partners, appellant's legal practitioners
Mugadza Chinzamba, respondent's legal practitioners

[5] See Genzel Mining (Private) Limited (supra)
[6] See S v Hollington and Another 2002 (2) ZLR 163 (H) per ADAM J and the rule equally applies to Civil Appeals