CITY OF GWERU
vs
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZISENGWE J.
MASVINGO, 13TH July & 22nd September, 2021

Opposed Application - Interdict

Mr B. Dube, applicant's legal practitioner
Mr J. Mpoperi, respondent's legal practitioner

ZISENGWE J: What is sought in this application is a combination of prohibitory and mandatory interdicts. The applicant seeks to have the respondent restrained from leasing out or otherwise authorising third parties to utilize certain pieces of immovable property situated within its municipal area contending that such use runs contrary to the terms and conditions of a servitude for which the said land was reserved or designated. Secondly it seeks to have the respondent compelled to take positive steps to comply with municipal laws and regulations governing the utilisation of what it calls "servitude stands".

The applicant is the local authority statutorily mandated to run the affairs of the midlands city of Gweru. It is averred in the main that it has come to its attention that the respondent, the latter a State owned enterprise established in terms of the Railways Act [*Chapter 13:09*] has taken upon itself to lease out the land in question to third parties (the latter who are mainly small scale traders or vendors) for use contrary to the land's legally designated purposes and have done so without its (i.e. applicant's) authority or consent. In an affidavit deposed to by its Acting Town Clerk, Mr. Vakayi Douglas Chikwekwe, it was averred on behalf of the applicant that officials of the City of Gweru became aware of the alleged conduct complained of rather fortuitously. This

was after it received an application for a shop licence from one of the respondent's lessees, one Edson Gapare. It was upon inspection of the site that the city officials noticed that the intended shop was in fact situated on what their revealed to be what it terms a "railway servitude". The applicant then promptly cancelled the temporary shop licence which it had granted in Gapare's favour before issuing demolition order of the structures erected thereon.

Disgruntled by the turn of events, Gapare turned to the court for relief in the course of which he challenged the demolition order in the Magistrates Court. That application was dismissed.

Thereafter, the parties exchanged correspondences, wherein they wrangled over the legality of the respondent's leases with third parties in respect of the pieces of land in question. Needless to say that whereas the applicant insisted that such leases were illegal as they flouted the terms of the Railway servitude for which the land was reserved, the respondent held a contrary view, maintaining as it did that there was nothing improper about such and that as the owner of the land in question enjoyed an unfettered right to deal with the same as it deemed fit.

It was then that the applicant sought to get to the bottom of the matter and carried out a survey on the utilisation of the land which according to its records were subject to the Railway Servitude within its area of jurisdiction. This survey revealed that Gapare's case was not an isolated one as eight other lessees had entered into leases with the respondent for various uses ranging from car sales and car wash facilities to various retail activities.

It was this finding that prompted the current application.

The terms of the order which the applicant seeks are captured on its draft order attached to the application which reads as follows:-

IT IS ORDER THAT:

1. The application be and is hereby granted.
2. The respondent be and is hereby interdicted/restrained from leasing out the railway servitude stands and causing, whether directly or indirectly, the erection of buildings or execution of works not required for the incidental to the purpose for which the land is reserved.

3. The respondent be and is hereby ordered to comply with applicant's by laws, rules and regulations and regularise. The occupation of railway servitudes within seven (7) days of this order, in terms of buildings already erected on railway servitude stands.
4. The respondent to pay costs of suit on an attorney client scale.

The application is sternly opposed by the respondent and its Regional Property Manager for the Midlands Province, Mr. Blessing Pukayi deposed to the opposing affidavit in support of its position. The said affidavit chronicles the events which culminated in the present stand-off between the parties. In a word it was averred that the respondent is the holder of title of the land in question. It was further averred that the applicant in flagrant violation of the respondent's rights over the property has in the past allocated and settled scores of vendors on the respondent's property and charging daily fess to the same for such use which illegal use was only temporarily interrupted by the government's COVID-19 induced restrictions.

It was contended on behalf of the respondent that the application should be dismissed as the requirements for the granting of the interdicts sought are not met. Most significantly it was averred that the applicant apart from making bald averments about the existence of a servitude did precious little to prove the existence of the same. It attacked the Applicant's failure attach to the application the requisite documentation detailing the nature, scope and extent of the alleged servitude. It was therefore averred that the application is fatally defective *inter alia* for want of proof of the existence of a clear right it being a pre-requisite for the granting of a final interdict.

The respondent also questioned the *bona fides* of the application given that the applicant has routinely done the very thing it now purports to complain of, namely to allocate pieces of land on the very same railway corridor to vendors for the latter's various commercial pursuits. According to the respondent, the applicant cannot breathe both and cold in the sense of authorising the use of the land adjacent to the railway line for a fee yet cry foul when the respondent does the same on the pretext of a need to protect the general public.

What the applicant seeks is a final interdict and the issue between the parties is simply whether the applicant has managed to establish the pre-requisite thereof.

The requirements for the granting of a final interdict are well known, they are;

1. The existence of a clear right
2. irreparable harm/injury actually committed or reasonably apprehended

3. absence of any other remedy why which applicant can be protected with the same result

See *Setlogelo* v *Setlogelo* 1914 AD 221, *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt Ltd and Another* 1980 ZLR 378.

Whether or not applicant has established a clear right

Central to the resolution of this question the interpretation of the terms of the servitude supposedly encumbering the respondent's enjoyment of the land in question. Therein lies the problem. The applicant failed to attach any documentation whatsoever to lay the basis of the claim of the existence of a servitude.

Contrary to the spirited claims by counsel during oral arguments in court that the respondent did not place the question of the existence or otherwise of the servitude in issue, the respondent's opposing affidavit contains large sections dedicated to this very issue.

In paragraph 8 of the Opposing Affidavit, for instance, the following was stated;

"*The applicant has not attached any documentation proving the averments of any servitude hence it has not been able to show that it has any right to bring this application before this court*."

Similarly in paragraph 12, it was averred as follows;

"*The point is made that the applicant has not attached any supporting documents as applicant has failed to get such supporting documentation proving that the respondent acted contrary to any provisions of its property to various tenants*"

In paragraph 15 the respondent pointedly averred as follows;

"*the applicant alleges that it went on the ground to carry out a survey on how the reserved servitudes. The terms of the alleged reserved servitudes have not been attached to the applicant's court application and as such, the averments pertaining to the said servitudes remain bald and unsubstantiated averments."*

I could go on *ad infinitum*, (see also paragraphs 16, 19, 25, 26 and 29); the long and short of it is that the respondent's opposing affidavit as with its heads of argument alike is littered with averments wherein it directly challenged the applicant to avail the requisite documentation spelling out not only the existence of the servitude but also its terms.

The learned authors Silberberg and Schoeman in "The law of property", 3rd edition at page 367 define a servitude in the following terms:

> *"A servitude is a* ius in re aliena *or a limited real right which entitles its holder either to the use and enjoyment of another person's property or to insist that such other person shall refrain from exercising certain powers flowing from his right of ownership and in respect of its property over and in respect of his property which he would have if the servitude did not exist"*

The applicant's quest to have the court interpret a document which is not before it is untenable.

What probably eluded the applicant is the general principle on the incidence of the burden of proof in civil matters which broadly speaking, and subject to certain qualifications states that he who alleges must prove. The most well-known articulation of the general approach is found in the case of *Pillay* v *Krishna and Another* 1946 AD 946 at 951 -2 where the following was stated;

> "*if one person claims something from another in a court of law, then he is to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it: where the person against whom the claim is made is not content with a mere denial of that claim, but sets out a special defence, as being the claimant, for his defence to be upheld he must satisfy the court that he is entitled to succeed on it ... But there is a third rule, which Voet state ... as follows: He who assets, proves and not he who denies, since a denial of a fact cannot naturally be proved provided it is fact that is denied and that the denial is absolute'... The onus is on the person who alleges and not on his opponent who merely denies it*."

In casu the applicant sought to rely on some yet obscure document which it described as "Gwelo Municipal Town Planning Scheme or Gwelo Municipal Town Planning Scheme Section 1, 2nd Resubmission". During the hearing I sought, but could not obtain, clarity from applicant's counsel on the species of that document which supposedly sets out the terms, nature and parameters of the stated servitude; whether it was a municipal by law (if so its correct citation) or a council resolution or Government Notice, Regulation or Statutory Instrument. Apart from some oblique reference to some By Law, counsel could not refer me to any such document.

The application being grounded on the existence, of a servitude, it behoved the applicant to avail the document setting out the same to enable the court to determine the rights, duties and obligations reposed on both the dominant and servient tenements. The production of that document be it statutory, contractual or otherwise would have enabled the court to determine whether there was a contravention of the terms thereby set out. Both parties appeared to suggest that the servitude was registered in terms of the Deeds Registries Act, Chapter 20:05. It was therefore incumbent

upon the applicant to attach a copy of the requisite deed to the application it being a public document therefore accessible to it.

The failure by the Applicant to furnish either the deed supposedly incorporating the terms of the servitude or primary document which birthed it (ostensibly the Gwelo Municipal Town Planning Scheme/ Gwelo Municipal Town Planning Scheme Section 1, 2nd Resubmission) rendered it practically impossible for the Court to apply the principles germane to the of interpretation of servitudes. To begin with, that document would have enabled the court to determine whether the servitude referred can be classified as personal or praedial. This in itself is significant because different outcomes may ensue from this basic difference. With the latter, for example, because of their onerous nature, a presumption operates against their existence, see *Coetzee v Malan* 1979 (1) SA 377; *Murray v Schneider* 1958 (1) SA 587. Further if indeed a servitude was found to exist from a reading of that document, the next step would have been to determine whether the Respondent by letting out portions of the land to third parties as averred by the Applicant, has been in violation of the terms thereof bearing in mind that servitudes are generally interpreted restrictively with a view limiting their extent, Murray v Schneider (supra). Similarly, the court would have been properly equipped to determine whether the servitude has been exercised *civiliter modo,* i.e. whether the holder of the right has in the context of the disputed facts been exercising it in the least burdensome manner, *Van Rensburg v Taute* 1975 (1) SA 279 (A); *Ex Parte Uvongo Borough Council* 1966 (1) SA 788 (N).

Equally noteworthy is the fact the dispute is replete with factual questions insoluble in the absence of the text of the servitude and two examples suffice. There is divergence as between the parties on the specific pieces of land subject to the alleged servitude, yet it is trite that praedial servitudes, for instance must relate to a specific piece of land, *Willoughbys Consolidated Co. Ltd v Copthall Stores Ltd* 1918 AD 1. The Respondent specifically disputed the identification of the land subject to the alleged servitude as MALD052, MALD060, MALD58, MALD065, MALD 073, MALD052, MALD057. It contended in this regard that such a description neither accords with the one officially registered with the Deeds Office nor does it correspond with the description with its (i.e. Respondent's) records. How then could the court have conceivably resolved this particular issue when the very identity of the land subject to the servitude is unclear.

Similarly, the question of the distance from the railway line that Respondent is precluded from utilizing for the protection of the public in cases of derailment or other accident was similarly put in dispute. According to the Respondent, its regulations require it to leave a vacant space of 15 metres to cater for such a contingency. This as with all other disputed facts could have been easily resolved upon the production of the document spelling out the terms of the deed.

The applicant took an unfortunate but fatal giant leap of faith in taking for granted the existence and terms of the alleged servitude. It therefore woefully failed to show the existence of a clear right it being the first requirement for the granting of a final interdict. This finding renders it unnecessary to deal with the remaining two requirements of an interdict (injury actually suffered or reasonably apprehended and absence of an alternative satisfactory remedy).

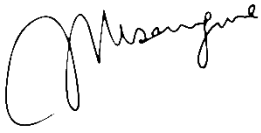
Costs

The general rule, of course, is that the substantially successful party is entitled to its costs. The respondent insisted on costs on the superior scale, but I do not find justification for the same. I hold the view that the conduct of the applicant in launching and persisting with the applicant was not so remiss as to warrant it being visited with costs on that scale.

In the result therefore the following order be and is hereby made;

Order

Application is hereby dismissed with costs.

ZISENGWE J. 

Gundu Dube & Pamacheche, applicant's legal practitioners
Saratoga Makausi Law Chambers, respondent's legal practitioners