PARTSON MASEKO

Versus

THANDEKILE MAHLAHLENI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA & NDLOVU JJ
BULAWAYO 10 July 2023

Civil appeal

T. Ndlovu, for the appellant
Ms. V. Chagonda, for the respondent

Ex-tempore

DUBE-BANDA J:

[1] This is an appeal against a part of a judgment of the Magistrate Court (the court *a quo*) dated 4 May 2022, which granted the respondent's application in terms of the Domestic Violence Act [Chapter 5:16].

[2] The respondent did not file heads of argument. Ms. *Chagonda* for the respondent conceded that without heads of argument the respondent had no right of audience. Further, Counsel informed the court that the respondent had no interest in defending this appeal. Therefore, this court had no benefit from the submissions of the respondent who elected not to participate in this appeal. Notwithstanding this position the judgment appealed was not abandoned in terms of s 41 of the Magistrates [Chapter 7:10], as read with Order 31 r 5 Of the Magistrates Court Civil Rules, 2019. I take it that the respondent has made a decision to abide by the decision of the court. Notwithstanding the position taken by the respondent, the Court proceeded to determine the appeal on the merits, and asked Mr. *Ndlovu* counsel for the appellant to make submissions. This is so because an appeal cannot be allowed or succeed in default. A judgment of a court may not be set aside because of the default of the respondent. It can be set-aside on the merits of the appeal.

[3] The facts of this matter are clearly set out in the judgment of the court *a quo*. They are that the respondent sought a protection order against the appellant in terms of s 8 of the Domestic

Violence Act [Chapter 5:16]. She contended that the appellant was of violent disposition, and had subjected her to physical, emotional, psychological and economic abuse. After reading papers filed of record and hearing the parties the court *a quo* found that the respondent had proved a case of domestic violence as defined in the Domestic Violence Act.

[4] The court *a quo* made an order in terms of s 11 of the Act, and further interdicted the appellant from taking possession of the respondent's property which was at the house the parties resided before the breakdown of their relationship. This is the part of the order that is subject of this appeal. It is against this decision that the appellant has noted an appeal on the following grounds:

i. The court *a quo* misdirected itself and acted ultra vires the Domestic Violence Act s 11 [Chapter 5:16] when it awarded the property obtained by the parties during their unregistered customary union to the respondent.
ii. The court *a quo* committed a gross irregularity when it delivered a judgment without listing the property and / or attaching the annexure in the judgment that it refers to in paragraph 6 of its order, in the operative part of the ruling.

[5] Mr. *Ndlovu* Counsel was specifically requested to address the court on whether the part of the order appealed and sought to be set aside was appealable as provided for in s 40(2)(b) of the Magistrates' Court Act, which says:

> (2) Subject to subsection (1), an appeal to the High Court shall lie against—
> (a)……..
> (b) any rule or order made in a suit or proceeding referred to in section eighteen or thirty-nine and having the effect of a final and definitive judgment, including any order as to costs. (My emphasis).

[6] It is clear that any rule or order having a final and definitive effect is appealable to this court. In *casu* the question is whether paragraph 6 of the order sought to be set aside is having a final and definitive effect and therefore appealable. A final and definitive order has been defined in case law. See *Chikafu v Dodhill (Pty) Ltd and Others* (80/09) ((Pty)) [2009] ZWSC 16 (06 May 2009). In *Zweni v Minister of Law-and-Order* 1993 (1) 523 (A) at 532l to 533B the court said:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another1992 (4) SA 202 (A) at 214D-G)."

[7] In its judgment subject to this appeal the court *a quo* said:

> "In the court's view, there is a dispute as to who owns the property in question, the issue of ownership rights needs to be resolved by a competent court. However, in the interim, the respondent has no right to take the assets without lawful authority if he has any claim to the property he can approach a competent court for the appropriate relief."

[8] Paragraph 6 of the order was issued in terms of s 11 of the Act for the purposes of keeping peace between the parties. The issue of who owns which property and who is entitled to which property has not been resolved. The order regarding property has no final effect; and it is not definitive of the rights of the parties; and it does not have the effect of disposing of the issue of property of the parties. Therefore, the order in respect of property is not final and definitive to be appealable as required by s 40(2)(b) of the Magistrates Court Act. It is for these reasons that this appeal stands to be dismissed.

[9] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. However, in this case the respondent did not file heads of argument and did not participate in these proceedings. In the circumstances she is not entitled to an order of costs.

In the result, the appeal be and is hereby dismissed with no order as to costs.

Dube-Banda J…….

Ndlovu J …….I agree

Sansole and Senda, appellant's legal practitioners
Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners