BONA MUTSAHUNI-MUGABE N.O.
and
TINOTENDA ROBERT MUGABE
and
BELLARMINE CHATUNGA MUGABE
versus
TINOS MANONGOVERE

HIGH COURT OF ZIMBABWE
TSANGA AND MAXWELL JJ
HARARE, 17 March, & 12 May 2022

Civil Appeal

T Zhuwarara, for the appellants
P Nhokwara, for the respondent

MAXWELL J

This is an appeal against the decision of the Magistrates Court sitting at Chinhoyi handed down on 10 September 2021.

Background Facts

On 20 May 2021, Chief Zvimba, Stanley Wurayayi Mhondoro, issued a default judgment against the Appellants' mother, Grace Mugabe. The Respondent had sued Grace Mugabe pertaining to the burial of the late former President of the Republic of Zimbabwe, Robert Gabriel Mugabe (the deceased). The default judgment ordered the Appellants' mother, among other things, on or before 1 July 2021, to; -

- Facilitate the exhumation of the late Robert Gabriel Mugabe from his burial place and his reburial at the National Heroes Acre.
- Collect the various personal articles of the late Robert Gabriel Mugabe from the State Residencies in Harare, Bulawayo and Chinhoyi and anywhere else in Zimbabwe, including clothing, and ensure they are in one place at the deceased's home in Kutama village.
- Pay five (5) heifers and a goat for the cleansing of the country.

- Pay whatever costs would be incurred in ensuring compliance with the order in the event of her non-compliance.

In the event of non-compliance with the second and third requirement of the order, the Messenger of Court for Chinhoyi was authorized to do what was necessary for the order to be complied with. This included collecting the heifers and a goat from Gushungo Dairies and Gushungo Farm in Mazoe. Authority was also granted to whoever is authorized by the laws of Zimbabwe to ensure the exhumation and reburial of the deceased.

The Appellants were were aggrieved with the decision of Chief Zvimba and approached the Chinhoyi Magistrates Court on appeal in terms of section 24 (1) of the Customary Law and Local Courts Act *[Chapter 7:05*] (the Act) as read with Rule 4 of the Supreme court (Miscellaneous Appeals and References) Rules, 1975. They averred that they are competent litigants to institute the appeal based on their real and direct interest in the orders of Chief Zvimba which affect their personal property and fiduciary functions at law respectively. They pointed out that the first Appellant is the duly appointed executrix to the Estate of the deceased and the second and third Appellants are sons to the said deceased.

In the court below, counsel for the Respondent raised three points in *limine*. The first point in *limine* was that there was no appeal before the court as Appellants were basing their appeal on rules that were repealed in 2018. The second point in *limine* was that the Appellants cannot appeal against a default judgment and the third was that there was misjoinder of Grace Mugabe who was the Defendant. After hearing the parties, in relation to the first point, the court below allowed necessary amendments to reflect that the appeal was instituted in terms of section 24 (1) of the Act. It was of the view that the amendments caused no prejudice to the Respondent. It went on to state that section 24 (1) of the Act relates to people who were parties in the main matter before the chief and the three Appellants had no basis of being dissatisfied with a decision of a matter in which they were not a party. Further that Appellants ought to have instituted interpleader summons if they felt that their property rights were to be affected. The second and third points in *limine* were not considered as the matter was dismissed on the basis of the first.

The Grounds of Appeal

The Appellants approached this Court on the following grounds; -

1. The learned magistrate of the court *a quo* made an error at law and misdirected herself when she dismissed the Appeal from the community court after incorrectly and erroneously interpreted *(sic)* section 24 (1) of the Customary Law and Local Courts Act *[Chapter 7.05]* to only allow the right of appeal from a community court to parties that were part of the proceedings before the Chief. The misdirection is apparent in that:
   a) The learned magistrate failed to distinguish the difference at law between 'a party' and 'any person' in the context of the aforesaid provision.
2. The learned magistrate of the court *a quo* erred at law and misdirected herself by failing to observe the Appellants' real and direct interest in the outcome of the chief's decision warranted their interference in light of section 24 (1) of the Customary Law and Local Courts Act. The court *a quo* erred specifically by:
   a) Erroneously disallowing the first appellant (Executrix dative of the estate late Robert Mugabe) to perform her statutory and fiduciary duties by appealing, to secure the assets of the estate that had been unlawfully subjected to the Community Court's judgment ordering redistribution per custom, in contravention of ongoing legal processes prescribed under general law.
3. The learned magistrate of the court *a quo* misdirected herself in her *ratio decidendi* when she concluded that the Appellant's *(sic)* alternative relief from the Chief's decision was to sue out interpleader summons when there was no cause of action making the interpleader relief available to the Appellants.

Appellants prayed that

1. the appeal be allowed with costs.
2. the judgment of the court below be set aside and substituted with the following
   'a) the preliminary point is dismissed;
   b) Costs to be in the cause'
3. the matter is remitted back to the Chinhoyi Magistrates Court for continuation of the hearing.

Submissions by the Parties

Appellants argued in their heads of argument that the magistrate's interpretation of section 24 (1) of the Act was flawed in that it was illegally restrictive in a manner that was not backed by any law. They argued that the phrase 'any person' ought to have been widely interpreted to cover any person who was materially affected by the decision of the Chief. They referred to the case of *Van Niekerk* v *Van Niekerk & Others* 1999 (1) ZLR 421 in which it was held that a wife of a deceased person was a "person aggrieved" for the purposes of s 52(9)(i) of the Administration of Estates Act and that the words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. Further that the words do not include, of course, a mere busybody who is interfering in things which do not concern him. Appellants argued that they cannot be described as busybodies as they clearly had a direct interest in the matter. They pointed out that their interest arose from the fact that first Appellant is the executrix of the deceased's estate whilst second and third Appellants were the owners of the beasts that were intended to be taken as fine payment. Appellants also argued that the interpleader summons was unnecessary since a recourse is prescribed in section 24 (1) of the Act. Appellants referred to the case of *Re Reed, Bowen & Co, Ex p Official Receiver* (1887) 19 QBD 178 quoted in the *Van Niekerk* case *(supra)* where Lord ESHER MR stated that; -

> "the words 'aggrieved person' are of wide import and should not be subjected to restrictive interpretation. They do not include, of course a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

In response Respondent raised two preliminary issues. He alleged that the appeal does not comply with the requirements of an appeal in terms of Order 32 Rule 4 of the Magistrates Court Rules, 2019, in that ;-

1. the Appellants purport to be appealing against part of the judgment yet the appeal is on the whole judgment.
2. The grounds of appeal are not concise.

On the merits, Respondent submitted that Appellants had no right of appeal as they were not parties to the proceedings which occurred in the Community Court. He further submitted that Appellants have taken advantage of the fact that the phrase 'any person' is not defined in the relevant statute but have not justified why there should be a distinction between a party and any

person at law in the context of section 24 (1) of the Act. He argued that a person is used interchangeably with a party. He referred to the case of *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited and Another* SC 3/20 where MALABA CJ said; -

> "It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning."

Respondent further argued that the interpretation of the phrase was not illegally restrictive. He referred to the case of *Chegutu Municipality* v *Manyara* 1996 (1) ZLR 262 in which it was stated that only where the grammatical and ordinary meaning of the words lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument should, the grammatical and ordinary sense of the words be modified so as to avoid the absurdity and inconsistency. Respondent argued further that the literal meaning of the phrase would grant every person who was not a party to community court proceedings a right of appeal thereby opening floodgates to litigation by busy bodies and an abuse of court process. Respondent submitted that the judgment by the Chief did not affect first Appellant's fiduciary duties as it did not order the distribution of the deceased's property. Respondent distinguished the case of *Van Niekerk* v *Van Niekerk & Others* (*supra)* on the basis that the issue in that case did not involve the question of whether a person who is not a party to proceedings in the community court has the *locus standi* to appeal against a decision of the community court. Respondent pointed out that there was no evidence that the beasts in issue belonged to the second and third Appellants and in any event there was no attempted attachment by the Messenger of Court. He stated that the order was specific as it was directed at the beasts belonging to Grace Mugabe and that the Magistrate was correct in reasoning that if second and third Appellants' beasts were attached then they had an adequate relief elsewhere in the form of interpleader pleadings. Respondent argued that Appellants had no direct legal interest in the matter other than purely emotional interest from a family point of view that their mother was affected by the decision of the community court. Respondent prayed for the dismissal of the appeal with costs on a punitive scale.

Analysis

The Respondent's counsel raised preliminary points. The first was that contrary to Order 31 (1) (4) (a) (which he erroneously stated as Order 34 Rule 12, and which is erroneously stated in Respondent's heads of arguments as Order 32 rule 4), Appellants' notice of appeal mentions that they are appealing against part of the judgment from the court below yet they are appealing against the whole judgment. In response, counsel for Appellants stated that the judgment appealed against had a favourable portion which Appellants are not taking issue with. Respondent's counsel had argued, in the court below, that there was no appeal before it as it was based on rules which had been repealed. After hearing the parties, the Magistrate had ruled that the appeal would be taken to have been instituted in terms of section 24 (1) of the Act. That ruling was indeed in favour of the Appellants. The first preliminary issue therefore lacked merit.

The second was that the grounds of appeal are not concise as they total almost a page when the judgment was only seven lines. Reference was made to the case of *Jensen* v *Acavalos* 1993 (1) ZLR 216 in which it was stated that a notice of appeal which does not comply with the rules is fatally defective and invalid. In response counsel for Appellants stated that the grounds of appeal ought to be judged on whether or not they communicate where there is an error and that a difference in style is not a basis for striking out grounds of appeal. The position taken by counsel for Appellants is supported in the case of Zvokusekwa v *Bikita Rural Distric Council* SC 44/15 in which GARWE JA (as he then was) stated; -

> "One must, I think, be guided by the substance of the grounds of appeal and not the form. Legal practitioners often exhibit different styles in formulating such grounds. What is important at the end of the day is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner."

This Court finds no merit in the objection to the grounds of appeal as they disclose the basis upon which the decision of the lower court is impugned.

The third preliminary point raised was that the relief sought is not exact as Appellants want the judgment of the court *a quo* set aside and substituted with a dismissal of the preliminary point without qualifying which preliminary point should be dismissed. In heads of argument for the Respondent, reference is made to the case of Ndlovu & Anor v *Ndlovu & Anor* SC 133/02 in which it was held that the relief sought had to be exact and competent. *Mr Nhokwara* argued that Appellants are praying for the continuation of the hearing of the matter at the Magistrates Court

yet there are two points *in limine* raised that were not disposed of. In response *Mr Zhuwarara* pointed out that the authority cited by the Respondent is not relevant as it dealt with Supreme Court Rules. He pointed out that in terms of the Supreme Court Rules, the relief sought should be exact, that is to say, legally sound in relation to the issues at stake. Contrary to that, Order 31 Rule 1 (4) (c) of Magistrates Court Rules, Statutory Instrument 11 0f 2019, requires the notice of appeal to state the nature of the relief sought. It is telling that the Magistrates Court Rules excluded the word exact and therefore their requirement is not the same as that in the Supreme Court Rules. That the Appellants are seeking an order for the continuation of the hearing is not a bar to the court below dealing with the preliminary issues that had not been dealt with. There is no merit in this preliminary issue as well.

On the merits of the matter, the first issue is the interpretation section 24 (1) of the Act. The section provides that

> "**24 Appeals from community courts**
> (1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated."

The contention is on the phrase "any person". The question that arises is whether the words are ambiguous and lack clarity. The Court finds no ambiguity or lack of clarity. The issue does not end there. What needs to be determined next is whether or not the ordinary grammatical meaning of the words lead to some absurdity, or some repugnance or inconsistency with the rest of the Act. Can it be said that to give the phrase "any person" its ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature. *Mr Zhuwarara* referred to the case of *Federartion of Master Printers of South Africa* v *Minister of Labour and Social Welfare 1937* TPD 123 in which it was stated that the words "any person" in their plain, ordinary and popular meaning include a third party. In the context of customary law, the Court finds no absurdity in allowing any person aggrieved by a decision of a community court to appeal against it, even though the aggrieved person was not a party in proceedings before the community court. *Mr Nhokwara* argued that such an interpretation would allow every Jack and Jill to approach the court. That cannot be correct as the appellants must indicate the basis upon which they are aggrieved, which basis will provide an effective way of keeping busy bodies at bay. In the court below, Appellants stated that the orders of Chief Zvimba affect their personal property and

fiduciary functions at law. That qualification removes them from the group of mere busy bodies. Sight should not be lost of the fact that this phrase allowing "any person" to appeal is in the context of a customary law statute. Under customary law, the quest for justice is marked by procedural flexibility in permitting aggrieved parties, in any case, to access the court at any time. It is therefore vital that the meaning of these words be looked at from the perspective of these vital principles of procedural justice. This is the very reason why the statute in fact incorporated "any person" in line with embracing customary processes of justice. As courts, it is therefore important that we do not fall into the dangerous trap of down playing these very positive procedural customary aspects by thrusting formalistic interpretations upon them.The court below erred in restricting the right of appeal to persons who were parties in proceedings before the community court.

Mr Nhokwara submitted that Appellants ought to have sought leave to appeal against a decision on a matter in which they were not parties. He relied on **Whalle & Others (Law Society of Zimbabwe intervening) v Cone Textiles (Private) Limited** 1989 (1) ZLR 54 in which it is stated that a person who is not a party is either bound, prejudicially affected or aggrieved by an order cannot appeal without leave. That case is distinguishable on the basis that the relevant statutes and rules of court do not refer to "any person".

On the basis of the above, the first and second grounds of appeal succeed.

On the third ground of appeal, Appellants impugned the magistrate's comment that they had an alternative relief from the Chief's decision in the form of interpleader summons. They submitted that interpleader summons was unnecessary since there is a recourse prescribed by section 24 (1) of the Act. They referred to the purpose of interpleader summons as explained in **Bernstein v Visser** 1934 CPD 270 @ 272 that; -

> " interpleader is a form of procedure whereby a person who is a stakeholder of other custodian of movable property to which he lays no claim on his own rights but to which two or more other persons lay claim may secure that they shall fight out their claim amongst themselves without putting him to the expense and trouble of an action/actions."

They querried the propriety of instituting a process that would be more costly when there is an expeditious way provided in the Act. The interpretation of section 24 (1) of the Act does not leave any justification for interpleader summons in the circumstances of this case. The third ground of appeal therefore succeeds.

Disposition

The appeal succeeds. The following order is appropriate.

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court a quo is set aside and the following be and is hereby substituted in its stead;
    a) The first preliminary point be and is hereby dismissed.
    b) Costs be in the cause.
3. The matter be and is hereby remitted back to Chinhoyi Magistrates Court for continuation of the hearing.

TSANGA J……I Agree

Chimwamurombe Legal Practice, Appellants' Legal Practitioners

Madzingira and Nhokwara, Respondent's Legal Practitioners