HB 108-16
HC 850-16
XREF HCA 29-16

NELSON MANGENA
versus
EDGARS STORES LIMITED
and
MESSENGER OF COURT, HWANGE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 APRIL AND 14 APRIL 2016

Urgent Chamber Application

S Mguni for the applicant
Ms E. Sarimana for the 1st respondent

MATHONSI J: The magistrates court sitting at Hwange granted summary judgment for the eviction of the present applicant from premises known as No. 730 Mpumalanga, Hwange which belong to the first respondent, on a date which is not apparent from the papers before me. The applicant made an application before that court for the rescission of the summary judgment order.

On 22 March 2016 the magistrates court directed that the application for rescission of judgment be heard in the normal way on the set down date of 7 April 2016. The applicant would have none of it. He immediately noted an appeal to this court on 24 March 2016 against the directions of the magistrates court which notice of appeal he then used as a weapon to ward off eviction from the premises, supremely confident that the noting of an appeal had suspended the summary judgment for his eviction. He had not reckoned on the predatory instincts of the first respondent who immediately instructed the messenger of court to proceed with eviction and the recovery of the sum of $754-00 representing arrear rentals and execution costs.

Acting by virtue of a writ of eviction and execution, the messenger of court evicted the applicant from the premises on 1 April 2016 casting aside the notice of appeal which the applicant wielded as defence against eviction. As he closed in on the applicant's property to

recover the outstanding money, the applicant quickly capitulated and paid the required sum of $754-00.

Distraught and obviously with wounded pride having been outplayed at his game the applicant looked up to this court launching an urgent "application for spoliation arising out of the respondent's conduct." The application is anchored on the fact that the respondents have taken the law into their hands by executing a judgment which has been appealed against. The appeal suspended that judgment and as such the eviction was unlawful and constituted an act of spoliation entitling the applicant to restoration of the *status quo ante.*

On those facts the applicant has moved for a provisional order in the following terms:

"TERMS OF THE FINAL ORDER SOUGHT
That you show cause why an order in the following terms should not be granted:

1. The execution of the judgment granted in favour of first respondent by a magistrate at Hwange on the 22nd of March 2016 under case number Gt27/16 should not be stayed pending the final determination of the appeal lodged by applicant in this court number HCA 29/16.
2. That the 1st and 2nd respondents bear the costs of this application.

INTERIM RELIEF GRANTED
Pending return date, applicant is granted the following relief;

1. The 1st and 2nd respondents are ordered to restore applicant into undisturbed occupation of House No. 730 Empumalanga, Hwange.
2. All the goods attached and/or cash paid in lieu thereof on the 1st of April 2016 be and are hereby restored to applicant."

It is significant that the applicant has not attempted to set out any basis for contesting his eviction from the premises, content to only rely on the noting of an appeal, an appeal noted not against the eviction order but ostensibly against the dismissal of his application for rescission of judgment when in fact the magistrate had only issued directions. That is exactly where the applicant has missed the point as Mr *Mguni* who appeared on his behalf, to his credit, conceded. First there was the order for eviction, then there was the order dismissing the application for rescission of judgment.

In fact, the applicant's situation became even more untenable when Ms *Sarimana* for the first respondent made her submissions. She painted a grim picture of the applicant as an

unrepentant dismissed employee whose forte of late has been to file endless unreasonable applications out of the magistrates court in Hwange which applications he has not bothered to prosecute.

According to Ms *Sarimana*, the applicant filed two applications for stay of execution and two applications for rescission of judgment which he set down for hearing in April and May 2016 clearly intending to delay the day of reckoning. Inexplicably he then demanded to be heard by a magistrate on an urgent basis on 22 March 2016, when his were ordinary applications which could not be entertained on an urgent basis. When the magistrate gave directions that the matters be dealt with on the set down date, that is 7 April 2016, the applicant seized that opportunity to note an appeal against that directive which could not possibly be appealed against.

It is that appeal which the applicant later sought to rely upon to ward off execution. Surprisingly when the date of hearing (7 April 2016) came, the applicant did not bother to attend court and his applications were systematically dismissed.

Mr *Mguni* conceded that the applicant could not appeal against the directions issued on 22 March 2016 as if they were a definitive determination of the matter. Clearly therefore if ever there was a suspension of an order by the noting of an appeal, it was the directive in question, a patently meaningless exercise. It was a useless appeal meant to accord the applicant a weapon to delay eviction but spectacularly misplaced leaving him exposed in respect of the eviction order which remains effectual and binding. This is a classic case of closing the back door while leaving the front door open and the applicant very wide open for a sucker punch.

This is an application for a *mandament van spolie*. The purpose of such remedy is to preserve law and order and to discourage persons from taking the law into their own hands no matter how much of a right they have in the property possessed by another. See *Chisveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 240 (H) 250 A – D. While it is true that when inquiring into whether spoliatory relief should be granted or not, the lawfulness or otherwise of the applicant's possession does not come into it, it is also a fact that in order to succeed the applicant for such relief must establish that dispossession was done forcibly or that there was wrongful interference with possession of a thing. See *Hortbac (Pvt) Ltd t/a Little Flower Enterprises* v *Officer in Charge ZRP Goromonzi and Others* HH 569/15.

It is the last leg of that inquiry which brings this application to its knees. The applicant was evicted by virtue of a court order. It is trite that a lessor who cannot obtain ejectment by process of law cannot be allowed to take the law into his own hands and secure possession which could not be obtained in law. But that is as far as it goes and not further. Even where the applicant was a statutory tenant, a situation which may not obtain in this case where apparently there were rent arrears, if he has lost possession he does not have the right to regain it merely because he has appealed. This is because the eviction was obtained through a lawful court order.

The situation of restoration of the *status quo* in cases of wrongful eviction through a court order appealed against but reversed on appeal was discussed extensively by GUBBAY CJ in *Delco (Pvt) Ltd* v *Old Mutual Properties and Another 1998 (2) ZLR* 130 (S) where at 134 B – C the learned Chief Justice pronounced:

> "Both majority judgments (By BARRY JP and DE VILLIERS J in *Makhebedu & Another* v *Ebrahim* 1947(3) SA 155 (T)) approved the proposition enunciated by CLAYDEN J that a statutory lessee who had been evicted by process of law is not entitled to be given possession of the premises against the lessor who has re-occupied if it is subsequently shown that the process of law was based on a wrong judgment (see respectively at pp160 and 169)"

Let me point out here for completeness that where an evictee has lost occupation of the premises by virtue of a judgment which was a nullity he or she is entitled to reinstatement because such an evictee may be regarded as being still in possession as the process was a nullity. See *Maisel* v *Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C) (quoted with approval in *Delco (Pvt) Ltd, supra)*

To that should be added the proposition that where the evictee has appealed against the eviction order such an appeal would suspend the operation of that eviction order thereby preserving the right of occupation. To the extent that execution of a suspended order would itself be a nullity one could safely say that the evictee under those circumstances would be regarded as being still in possession and therefore entitled to restoration.

Unfortunately that is not the case with the present applicant. True enough he appealed but not against the eviction order. He only appealed against directions given by a magistrate which were merely interlocutory and not definitive in determining the matter. That appeal left

the eviction order intact, lawful and binding. Its execution was therefore proper and lawful. This application has therefore been an exercise in futility and completely misplaced.

Ms *Sarimana* asked for costs on a punitive scale because of the applicant's reprehensible conduct which dates back a long time.

He has been filing applications he has not prosecuted and also filed a meaningless and unnecessary appeal. I agree that there must be consequences dire to a litigant who thinks he can abuse the process of the court to avoid the inevitable. Not only was this application a sheer waste of time, the applicant has been shown to be a litigant that wants to play football with the court.

Accordingly the application is hereby dismissed with costs on the scale of legal practitioners and client.

Dube, Mguni & Dube Legal Practitioners, applicant's legal practitioners
Coghlan & Welsh, 1st respondent's legal practitioners