

AMOS JIHAZI

Versus

THE REGISTRAR OF HIGH COURT N.O.

And

THE ADMINISTRATOR N.O.

And

SMM HOLDINGS (PVT) LTD

And

MESSENGER OF COURT, ZVISHAVANE N.O.

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 10 NOVEMBER 2015 & 14 JANUARY 2016

Urgent Chamber Application

S. Nkomo for the applicant

Ms G. Nyabawa for 2nd and 3rd respondents

TAKUVA J: This is an urgent chamber application for an interdict.

The facts which are common cause are as follows. Pursuant to a labour dispute the 2nd and 3rd respondents instituted proceedings in the Magistrates' Court at Zvishavane seeking the following relief.

- (a) an order for eviction of the applicant and all those claiming right through him from house number F4 B NIL Township, Zvishavane.
- (b) in the event that applicant refuses to vacate the house after being served with the summons or defends the action an order for payment of holding over damages

- calculated at the rate of \$32,00 a month from October 2011 to date of defendant's removal.
- (c) an order for payment of interest at the prescribed rate of 5% per annum calculated from the date of the summons and;
 - (d) an order for costs of suit.

Applicant entered appearance to defend which prompted the respondents to successfully apply for summary judgment. Dissatisfied, applicant appealed to this court under case number HCA 49/15. First respondent wrote to applicant's legal practitioners on 15 July 2015 calling upon them to file heads of argument within 15 days in terms of the rules. Applicant's legal practitioners complied and had their heads filed on 4 August 2015. Surprisingly, 1st respondent wrote to applicant's legal practitioners on 20 August 2015 indicating that no heads of argument had been filed by that date and that the appeal was deemed to be abandoned and dismissed. This notice was not served on the applicant who only became aware of its existence on 22 October 2015 when 4th respondent came to execute the judgment.

Applicant's legal practitioners then confronted the registrar with a copy of their heads of argument date stamped 4 August 2015. The registrar's explanation was that the heads had been misfiled by staff in his office. Realising that applicant's heads had been filed within the *dies induciae* his legal practitioners applied for reinstatement of the appeal on this court's appeals roll. The application was made under case number HC 2901/15.

Notwithstanding the glaring error by the registrar and its dire consequences on applicant's case, 2nd and 3rd respondents strenuously opposed the application for stay of execution pending the determination of applicant's application for reinstatement of the appeal. The grounds of opposition as advanced by Miss *Nyabawa* for the 2nd and 3rd respondents can be summarised as follows:

- (i) the applicant should have sought leave from the 2nd respondent to institute these proceedings as is required by section 6 (b) of the Reconstruction of

State – Indebted Insolvent Companies Act Chapter 24:27 (the Act). She relied on the following cases;

(a) *SMM vs D. Mapimhidze* HH 144/15

(b) *SMM Holdings Ltd vs Minister of Justice* 2010 (1) ZLR 286 (S)

- (ii) Applicant should have sought recourse with the Supreme Court in terms of O 31 r 42 of the Magistrates' Court Civil Rules.
- (iii) Application is not urgent as applicant did not act diligently in that he should have filed this application immediately after the 22nd of October 2015. The fact that he did so on the 5th of November 2015 shows that the urgency is self-created.

On the merits, it was submitted that the applicant's prospects of success are bleak in that he deserted employment and therefore has no legal basis to remain in occupation of the house. It was further submitted that he has alternative remedies one of which is to apply for terminal benefits if any. It was argued that applicant will not suffer any irreparable harm if evicted, since he has no right to occupy it in the first place. Finally it was submitted that the balance of convenience does not favour the granting of the interdict as 3rd respondent will suffer while on the other hand 3rd respondent can pay applicant his terminal benefits.

Mr *Nkomo* for the applicant submitted that the 1st point *in limine* has no merit in that it was unnecessary to seek leave from 2nd respondent because initial proceedings were initiated by the 2nd and 3rd respondents in the Magistrates' Court. The decision was in their favour and applicant appealed. It is the appeal that led to this application. Therefore, this application is simply a continuation of proceedings instituted in the Magistrates' Court by 2nd and 3rd respondents.

In my view, the need to seek leave in terms of the Act does not apply where the Administrator himself institutes legal proceedings which for one reason or another are not brought to finality. To ascribe such an absurd meaning to the provisions of the act would certainly result in grave injustice. As stated by ZHOU J in the *Mapimhidze* case *supra*, the

purpose of section 6 (b) is “to ensure that its assets are not depleted by execution thereby frustrating the purpose of reconstruction which is to enable the company to become a successful concern in order to prevent loss of public funds and protect the interests of creditors.” I would add that the purpose is not to enable the company to evade litigation or extinguish claims or debts. For this reason I would dismiss the 1st point *in limine*.

As regards urgency, the facts show that it is not self created. Upon realizing that 3rd respondent had a writ, applicant immediately sought an explanation from the 1st respondent as regards the status of the record. When an explanation was proffered, he then instructed his lawyers to file the two applications on the 5th of November 2015. In the circumstances the nine day delay cannot be described as inordinate in that the explanation for it is reasonable. The second point *in limine* is therefore dismissed.

The rules regarding the granting of an interdict are well settled in our law. CORBETT J (as he then was) formulated the requirements of an interlocutory interdict as follows:

- “Briefly these requisites are that the applicant for such temporary relief must show –
- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
 - (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
 - (c) that the balance of convenience favours the granting of interim relief and
 - (d) that the applicant has no other remedy” See *L F Boshoff Investments (Pvt) Ltd vs Cape Town Municipality* 1969 (2) SA 256 (c) at 267A – F.

It is trite that the court has to decide in its discretion, whether or not to grant a temporary interdict. The court must be satisfied that the applicant has proved an actual or well-grounded apprehension of irreparable loss if no interdict is granted. It must also have regard to the balance of convenience where only a *prima facie* ground for an interdict has been established. An applicant who fails to cross this threshold cannot succeed in his claim.

In *Nyambi & Ors vs Minister of Local Govt & Anor* 2012 (1) ZLR 569 (H) ZHOU J listed the requirements for an interim interdict as;

- “(1) that the right which is sought to be protected is clear; or
- (2) (a) if it is not clear, it is *prima facie* established though open to some doubt, and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right;
- (3) that the balance of convenience favours the granting of interim relief; and
- (4) the absence of any other satisfactory remedy.”

In casu, the applicant clearly has a *prima facie* right ex-contracto not to be unlawfully evicted from the house. To suggest that he has no right because he is occupying that house unlawfully as an ex-employee, is in my view, to put the cart before the horse. The crux of the matter is that there is a labour dispute between the parties. The resolution of this dispute will ultimately establish the legal relationship between the parties.

As regards irreparable harm, I take the view that it goes without saying that if applicant is evicted pending the determination of the application for reinstatement of his appeal, he will suffer irreparable harm in that the outcome will simply be of academic interest.

The balance of convenience favours the granting of the relief. The 2nd and 3rd respondents will not be unduly prejudiced by the interim relief as the dispute relates to occupation and not ownership rights. Once the labour dispute is resolved, the 2nd and 3rd respondents will, if the outcome is in their favour, secure the house. If not, they still may pay damages *in lieu* of reinstatement in order to secure occupation. On the other hand, the status of the 3rd respondent makes it extremely difficult for the applicant to successfully recover damages.

On the facts, there is no other remedy available to the applicant other than an order of stay of execution. The provisions of the act, in particular section 6 (c) make it impossible for the applicant to attach 2nd and 3rd respondents' assets in execution. It states “any attachment or execution put in force against the assets of the company after the commencement of the reconstruction shall be void;” Put simply respondents may pay damages to applicant if they so

chose but they cannot be compelled to do so even by a court of law. They enjoy the protection of the provisions of the act.

Accordingly, it is ordered that:

- (1) 2nd, 3rd and 4th respondents be and are hereby ordered to stay the execution of the judgment of the Magistrates' Court under case number 558/14 pending the finalization of this application.
- (2) the provisional order together with all supporting documents shall be served upon the respondents at their given address forthwith.

H. Tafa & Associates, applicant's legal practitioners
Chigariro Phiri Legal Practitioners, 1st & 2nd respondents' legal practitioners