HB 231-16
HC 1456-16
XREF HC 414-16
XREF HC 3703-11

PRISCA MPOFU
versus
REGIS BANDA
and
JANE NEDDIE KASTON NO
and
THE SHERIFF OF ZIMBABWE NO

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 JUNE 2016 AND 1SEPTEMBER 2016

Urgent Chamber Application

C N Dube for the applicant
N Ndlovu for the 1st respondent
2nd respondent in person

TAKUVA J: Applicant filed this application seeking the following provisional order:

"Pending the determination of this matter on the return date the applicant is hereby granted the following relief:

(1) The warrant of eviction and notice of eviction issued under HC 414/16 be and is hereby stayed pending the finalization of HC 3737/12.
(2) The 1st, 2nd and 3rd respondents be and are hereby interdicted from evicting the applicant and all those claiming occupation through her from house no. 11438 Nkulumane, Bulawayo pending the finalization of HC 3737/12.
(3) In the event that eviction has taken place, the 3rd respondent be and is hereby ordered to restore the applicant to house No. 11438 Nkulumane, Bulawayo."

The history of this case is long and unfortunate in certain respects. The late Abson Kasekani (Abson) died intestate on 25 July 2008 at Wedza and his estate was registered with the Assistant Master of this court on 15 February 2010. The second respondent was appointed the executrix dative of that estate. It appears, Abson had another wife who the second respondent is vigorously disowning. Abson and applicant and their two children lived at house number 11438

Nkulumane Bulawayo while second respondent lived in Wedza. Somehow, second respondent sold the house to first respondent who under case number HC 178/10 applied for the eviction of applicant from that house. Applicant opposed that case.

In 2012 under case number HC 3737/12 applicant sought an order that the finalization of the estate and the agreement of sale between first and second respondents be declared null and void on grounds of gross irregularity. The first respondent was served and filed a notice of opposition and up until now, the matter has not been set down for hearing.

Despite knowledge that applicant was occupying the house not through the second respondent but in her own right as Abson's widow, first respondent issued summons under case number HC 414/16 citing only second and third respondents. For obvious reasons, the second respondent did not oppose the matter and applicant obtained a default judgment on 24 March 2016 per MAKONESE J in the following terms:

> "(1) The 1st respondent and those claiming through her are hereby directed to vacate and give vacant possession of house number 11438 Nkulumane, Bulawayo to the applicant immediately after granting of this order.
> (2) The Deputy Sheriff, Bulawayo be and is hereby authorized to forcibly evict the first respondent and all persons claiming occupation through her from house number 11438 Nkulumane immediately after granting of this order.
> (3) No order as to costs."

The first respondent in that matter is the second respondent in this matter. After obtaining this order the first respondent in *casu* caused the third respondent to issue a notice to vacate the house on 6th June 2016 with the ejectment date being the 9th day of June 2016. The notice was addressed to the second respondent and "all those claiming occupation through him/her." Applicant was served with this warrant of eviction on 7 June 2016 prompting her to file this matter on an urgent basis on 9 June 2016. The matter was set down for hearing on 17 June 2016. Unfortunately, the applicant had been evicted by the time the matter was heard.

The basis of the application was that the applicant had been in occupation of the premises since 1989 and that she had no alternative remedy other than the order for stay of execution. It was also argued that the first respondent acted *mala fide* when he obtained the order under HC 414/16 in that he concealed important information regarding the status of the applicant.

Although he had purportedly purchased the house from second respondent he became aware of applicant's existence and her true status as early as 2012 when she challenged the agreement of sale under HC 3737/12. Further, first respondent knew at that time that applicant was a beneficiary in the estate and that there were allegations that second respondent had fraudulently left her out and registered the estate without her knowledge.

It was also contended that the alleged agreement of sale between first and second respondent was voidable if not *void ab initio* in that firstly it was entered into before the second respondent had been issued with the requisite Letters of Administration by the Assistant Master. Quite clearly, therefore, the second respondent lacked legal capacity to sell the house. Secondly, the purported agreement contravened the provisions of the Administration of Estates Act [Chapter 6:01] in that the authority to sell the house in question by private treaty in accordance with section 120 thereof was only granted on 14 September 2009, two months after she had already sold the house.

For the above reasons it was contended for the applicant that since the second respondent and herself were customarily married to Abson, she had established a *prima facie* right in the property. As regards irreparable harm, it was submitted that she will definitely become destitute together with her two young children as she has no other accommodation. Also, it was argued that the balance of convenience favours the granting of the interdict as first respondent will not suffer any harm pending the finalization of HC 3737/12.

The requisites of a temporary interdict are usually stated as;

(a) a prima *facie right*
(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
(c) a balance of convenience in favour of the granting of the interim relief; and
(d) the absence of any other satisfactory remedy; See *Steel and Engineering Industries Federation and Other* v *National Union of Metal Workers of South Africa* (2) 1993 (4) SA 196 (T) at 199 G – 205J.

It is trite law that the object of this remedy is the protection of an alleged existing right. It is not a remedy for the past invasion of rights. Its effect is to maintain a certain *status quo* by freezing the position until the court decides where the right lies. Thereafter, it ceases to exist. see *Airfield Investments (Pvt) Ltd* v *Minister of Lands and Others* 2004 (1) ZLR 511 (S) at 517 F-H.

The legal position was also succinctly put by NDOU J in

Setsail Equipment (Pvt) Ltd
versus
Javington Investments (Pvt) Ltd
and
Deputy Sheriff for Bulawayo HB 74/12, as follows:

> "The major hurdle facing the applicant is that his urgent application was filed after the Deputy Sheriff had acted pursuant to writs issued under HC 3351/11. The applicant seeks in essence the return of the attached property and reversal of the writ of ejectment filed on pages 12 and 13 of this application. It is trite law that an interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken away from him by operation of law at the time he or she makes an application for interim relief. An interdict is sought to protect rights in property. An application for interim interdict for property already taken away from the applicant may not be granted."

In the present case, the applicant was evicted on the day she filed her urgent application. By the time the application was subsequently heard applicant's rights had already been taken away from her by operation of the law. Consequently, an interdict cannot be granted.

In the circumstances, the application is dismissed with no order as to costs.

Legal Resources Foundation, applicant's legal practitioners
Kossam Ncube & Partners, 1st respondent's legal practitioners