

KELVIN ZINDODYEYI

And

THERESE CHIKETSANI

Versus

ASPINAL INVESTMENTS (PVT) LTD

And

**PHILLIPAH MARGARET MUSEVE
t/a SIMMRAN**

and

MESSENGER OF COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 AUGUST & 22 SEPTEMBER 2016

Urgent Chamber Application

L. Mguni for the applicants
G. Nyoni for the 1st respondent
N. Ndlovu for the 2nd respondent

TAKUVA J: The applicants approached this court on an urgent basis seeking the following interim relief.

“Pending the confirmation or discharge of this order that this order shall operate as a temporary order having the effect of:

- (a) Interdicting 3rd respondent from evicting 1st and 2nd applicants from shop number 19 Haddon & Sly Building, pursuant to a court order granted in favour of 1st respondent against 2nd respondent in the Magistrates’ Court under case number 3532/16.
- (b) Directing 3rd respondent, if at the time that this order is granted or served, execution of the said warrant has been made in anyway, to ensure that the applicants are restored into the shop.”

The applicants' version is fairly straight forward. It goes like this. In 2014, they entered into an oral lease agreement with Gilbert Nyamutsamba [Gilbert] representing the 1st respondent. The lease related to shop number 19 Haddon & Sly Building Bulawayo. They paid rentals to a company called Astrix Giltex (Pvt) Ltd as shown by the receipts they attached as annexure A.

Sometime in July 2015 the 2nd respondent appeared on the scene claiming that she was the lawful tenant at the premises they were leasing. Second respondent then produced lease agreements which the two signed in the presence of Gilbert who confirmed this new arrangement. As a result applicants paid their rentals to the 2nd respondent from August 2015 to December 2015 when 2nd respondent vacated the premises.

Gilbert then approached applicants with an offer to lease the property in their own right. Applicants accepted the offer and an oral lease agreement was entered into with effect from January 2016. According to the applicants, Gilbert indicated that he would not issue receipts for their rental payments. They suspected Gilbert was avoiding paying tax. In March, Gilbert attempted to evict them unlawfully from the shop. In May 2016, 1st respondent caused summons for arrear rentals of US10 000,00 and eviction to be issued against the 2nd respondent who consented to judgment. Applicants were then served with a warrant of eviction and execution which had been issued by the Magistrates' Court. The warrant authorized the 3rd respondent to evict the 2nd respondent and all those claiming through her from shop 19 Ground Floor, Haddon & Sly Building, corner Fife Street and 8th Avenue Bulawayo. Applicants were served with the warrant on 22 July 2016.

Dissatisfied, applicants filed this application on the following grounds;

- (a) that the order granted by the Magistrates' Court does not apply to them as they did not occupy the shop through 2nd respondent.
- (b) they do not owe Gilbert or 2nd respondent arrear rentals.
- (c) they are occupying the shop lawfully and have a clear interest on the execution of the order.

(d) that they have simultaneously filed an application under cover of case number HC 1904/16 for a declaratory order that the 3rd respondent be permanently interdicted from evicting them from shop number 19, Haddon & Sly Building, and also that the order obtained by 1st respondent in the said Magistrates' Court is not in respect of the two of them.

Both 1st and 2nd respondents opposed the application. The 1st respondent through its director, Gilbert filed an opposing affidavit wherein he raised two points *in limine* namely.

- (a) that the applicants have adopted a wrong procedure and are in the wrong court. Consequently, the relief they seek is incompetent.
- (b) the application cannot succeed as there are effective satisfactory remedies available in the Magistrates' Court Act Chapter 7:10

On the merits, it was contended that applicants have no *prima facie* right in that they are not even statutory tenants because they are not paying rent – see section 22 (2) of the Commercial Rent Regulations SI 676/83. Further, it was argued that as sub-tenants, the moment the tenant is evicted, they are automatically evicted as their rights are subservient to the tenant's rights. The sub-tenants' rights cannot stand on their own – see *Zuva Petroleum Ltd v Chireya* HH-166-16.

The 2nd respondent also filed a notice of opposition and an opposing affidavit. In that affidavit she stated that she is the lessee and applicants are her sub-tenants. First respondent approved of this subletting. She was however surprised when at times she discovered that applicants were paying rentals directly to the 1st respondent. She confronted both parties and decided to prepare lease agreements for the 2 applicants. Both signed the respective leases in August 2016 after she had renewed her lease with 1st respondent in July 2016. She attached the three lease agreements as annexures A, B and C.

She admitted that she consented to the judgment in favour of 1st respondent in the Magistrates' Court because she owed him the amount claimed. This indebtedness to 1st respondent is a result of applicants' defaults in their rental payments. She explained that although she was 1st respondent's tenant, she had not been in physical occupation of the shop since January 2014 when she let the shop to the applicants. Finally, she prayed for the dismissal of this application with costs at attorney and client scale.

In my view the points *in limine* are inextricably interwoven with the merits. I therefore deal with them at once.

In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (c) at 267A-F, CORBETT J (as he then was) said an applicant for an interim interdict must show:

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of 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 succeeded in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no satisfactory remedy." See also *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S).

C. B. Prest, *The Law and Practice of Interdicts* Juta 1993 at page 52 explains the significance of a *prima facie* right in an application for an interdict. He states;

"Interdicts are based upon rights, rights which in terms of the substantive law are sufficient to sustain a cause of action. Such right may arise out of contract, or a delict; it may be founded in the common law or on some or other statute; it may be a real right or a personal right. The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed, and if he does not do so, the application must fail.

An applicant must establish ‘some just right’. It must not be a mere moral right, it must be a strict legal right.”

This therefore is the threshold that must be crossed, and a failure so to do means that an applicant cannot succeed in his claim. The onus of proving such a *prima facie* right rests on the applicant. It must be proved on a balance of probabilities. As regards the meaning of the words “*prima facie* case”, Prest states on p 55 of the same work;

“If the correct meaning, it is submitted is that an applicant is required to furnish proof which if uncontradicted and believed at the trial, would establish his right. The use of the phrase ‘*prima facie* established though open to some doubt’, however, indicates that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. What then is the approach of the court to be in the face of a dispute of fact on the papers before the court? The proper manner of approach is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to ‘some doubt’. (my emphasis)

In order to determine whether the applicant has made out a *prima facie* case, the court inquires into whether he has discharged the onus resting upon him by the affidavits placed before the court. In the present case, the applicants are incapable of crossing the threshold of establishing a *prima facie* right for the following reasons;

- (i) both applicants have failed to prove on a balance of probabilities that they have an oral lease agreement with the 1st respondent. Their versions in the affidavits is not only improbable but thoroughly incredible. It is highly improbable that Gilbert would suddenly desire to avoid payment of tax by not issuing receipts to the 2 applicants from January 2016 when all along he had been issuing receipts to all his tenants including at one stage to the applicants. Further, it certainly does not

make sense that Gilbert would collect rentals from applicants and then proceed to issue summons claiming the same rentals he had already been paid.

- (ii) Applicants dismally failed to prove that they are statutory tenants in that they did not pay rent to the landlord for the premises they have been occupying for more than six months. The facts that both applicants have failed to contradict are that both had a lease agreement with the 2nd respondent. Since their rights are subservient to the 2nd respondent's rights, they were extinguished when 2nd respondent's rights were taken away by the magistrate. See *Maposa v Matabuka* HH-801-15.

The application should be dismissed on this ground alone. Assuming however that I am wrong, there is another reason why this application has no merit. Applicants have a satisfactory alternative remedy provided by statute in section 39 of the Magistrates' Court Act Chapter 7:10. The section provides a sufficient platform for litigants who feel that they should have been part of a process to be heard. Section 39 states:

“39 (1) In civil cases, the court may –

- (a) rescind or vary any judgment which was granted by it in the absence of the party against whom it was granted;
 - (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
 - (c) correct patent errors in any judgment in respect of which no appeal is pending.
- (2) The powers given in subsection (1) may only be exercised after notice by the applicant to the other party and any exercise of such power shall be subject to appeal.
- (3) Where an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the application and the direction shall be made upon such terms if any, as the court may determine as to security for the due performance of any judgment which may be given upon the application.”

The remedies provided herein include rescission of judgment and stay of execution pending the decision upon the application. These are the same remedies applicants are seeking

in this court. Put differently applicants seek a rescission of the magistrate's order. Quite clearly, the applicants have an alternative remedy.

For these reasons the application is dismissed with costs.

Job Sibanda & Associates, applicant's legal practitioners
Moyo & Nyoni, 1st respondent's legal practitioners
Kossam Ncube & Partners, 2nd respondent's legal practitioners