ROGERS DHLIWAYO
versus
SHAUN MANDAA KUDINGA
and
MESSENGER OF COURT
and
PROVINCIAL MAGISTRATE HARARE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 1 and 8 April 2009

Opposed Matter

Ms *Bvumbi*, for applicant
Mr *F Katsande*, for respondent

MAKONI J: The applicant seeks an order on review in the following terms:

1) The applicant's delay in bringing up this application for review be and is hereby condoned.

2) The warrant of ejectment issued by the Magistrate Court on 28 March 2008 in case No 648/08 be and is hereby set aside.

3) The first respondent shall restore possession of the property known as No.5 Jacaranda Close Hatfield Harare to the applicant upon the granting of this order failing which the deputy Sheriff and is hereby authorized to restore such possession.

4) The second respondent shall return to the applicant property he attached and removed on 16 June 2008 in execution at No 5 Jacaranda Close Hatfield Harare upon this order being served on him

5) The applicant shall remain in possession of the property known as No. 5 Jacaranda Close Hatfield Harare and the first respondent shall not execute on the certificate of ejectment in case No RB/E BE7/12/07 until case No. RA 150/08 pending in Administrative Court is finalized.

The background to the matter is that on 25 January 2008, the first respondent obtained a certificate of ejectment from the rent board. On 18 February 2008 the applicant appealed to the Administrative Court against the issuance of the certificate. On 17 March 2008 the applicant was granted a rule nisi for stay of execution of the certificate of ejectment until the appeal is finalized. The return date of the rule nisi was 28 April 2008. On that date the third

respondent issued an order postponing the matter *sine die* and extending the *rule nisi* indefinitely.

On 28 March 2008 the first respondent obtained a writ of ejectment from the Clerk Court on the basis of the certificate of ejectment. On 16 June 2008 the applicant was ejected from the leased premises. It is this writ of ejectment that the applicant seeks to have reviewed.

Application for Condonation

The applicant avers that he was ejected on 16 June 2008. On 17 June 2008 he approached this court on a certificate of urgency seeking an order for restoration. The court ruled that the matter was not urgent as execution had already taken place. On 30 June 2008 he filed a Court Application seeking an order of restoration. The matter was heard on 11 November 2008. The court made a finding that the applicant should have cited the third respondent. He then brought the present application which was filed on 14 November 2008.

The application is opposed. The first respondent avers that the application was not filed within the prescribed eight weeks. None compliance with the rules is fatal to the application.

In determining an application for condonation the applicant must satisfy the court that there is good cause. The factors to be taken into account in considering whether good cause has been shown were clearly spelt out in *Bishi v Secretary for Education* 1989(2) ZLR 240 H at 243B.

These are:-

(a) the degree of the non compliance with the rules
(b) the explanation therefore
(c) the prospects of success on the merits
(d) the importance of the case
(e) the convenience of the courts
(f) The avoidance of unnecessary delay in the administration of justice.

Degree of non compliance with the rules

The writ of ejectment was issued on 28 March 2008. The applicant got to know about the writ on 16 June 2008 when it was executed. The present application was filed on 14 November 2008 some five months after the applicant became aware of the existence of the writ. In my view such a delay is inordinate.

The explanation therefore

The applicant submits that he was pursuing the matter. He adopted the wrong approach by filing a court application instead of an application of review. He urges the court to condone that conduct.

The first respondent submits that the explanation tendered by the applicant is not reasonable. The applicant was at all material times represented by a legal practitioner and there can be no question of lack of apprecitiation of the rules of the court.

I share the sentiments of the first respondent. The applicant had the benefit of legal representation at all material times. He should have been properly advised and adopted the correct procedure at the outset. I am of the view that no reasonable explanation has been proffered by the applicant.

The prospects of success on the merit

The grounds for review which the applicant seeks to relay on are:

i. That the writ issued by the third respondent was unprocedural.

ii. Execution of the writ was illegal as it violated the rule nisi which stayed execution in definitely.

iii. Execution was in defiance of two orders of this court.

The first respondent submits that the certificate of ejectment was registered as a judgment in the magistrate's court. He further submits that s 30 of the Rent Regulations, S I 2007 did not envisage surrogate litigation after the issue of the certificate of ejectment.

In *Sean Kudinga vs Rogers Dhliwayo and Anor* HH 22/2008 the purpose of and the effect of a certificate of ejectment was discussed by the learned MAKARAU JP. She had this to say on page 4 of the cyclostyled judgment;

> "It thus appears to me that the issuance of a certificate by the rent board is merely a preliminary step before obtaining a court order for the ejectment of the tenant. It is not the ejectment order itself. It's not a judgment nor can it be used for purposes of issuing a writ of ejectment from any court".

It is clear from the above remarks by MAKARAU JP that the writ was irregularly obtained.

'I would add to the above remarks that if it was the intention of the legislature that a certificate of ejectment be an ejectment order or be registered with the Magistrate Court for purposes of execution, then the legislature would have specifically provided so. A good example of such a provision is s 98(14) and (15) of the Labour Act [*Cap 28.01]*. which provides for the registration of arbitral award and that one registered, it shall have the effect of a civil judgment for purposes of enforcement.

In para 3-5 of his draft, order the applicant seeks restoration of possession of the premises In question and ancillary relief. From the time that the applicant was ejected to date, a period of nine months has elapsed. The court ascertained from the first respondent the position

regarding tenancy of the property as at the time of hearing. It was advised that the property was now being occupied by a third party. This fact was disputed by the applicant.

The premises are no longer available. In any event the 3rd party has not been made a party to the present proceedings. Therefore no practical purpose would be served by granting the order of restoration. See *Chisveto v Minister of Local Government & Town Planning* 1984(1) ZLR 248 at 252 F-H.

It is clear that because of the impracticality of restoration for review the application has no prospects of success on the merits. I will therefore not grant the extension of time.

In my view, having found the above, it is not necessary to consider the other remaining factors as spelt out in Bishi *supra*.

Accordingly I make the following order:

1. the application is dismissed
2. The applicant shall bear the costs of the application

Mkuhlani Chipesra, *a*pplicant's legal practitioner
F M Katsande & Partners, 1st respondent's legal practitioner