

RITA MARQUE MBATHA
and
IVYN GABRIEL MBATHA
versus
MIMOSA MINING (private) limited
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 31 August and 21 September 2011

Urgent Chamber Application

The first applicant in person
The second applicant not in attendance
N Timba with *T Sithole*, for the first respondent
No appearance for the second respondent

MAVANGIRA J: The first respondent instituted proceedings in the magistrates court against the applicants for their eviction. The eviction order was granted after the court had heard the parties. The applicants noted an appeal challenging the magistrate's decision on the merits as well as on the basis that the first respondent had no *locus standi* in the matter. The first respondent applied for leave to execute the eviction order pending appeal. The application was granted.

On 6 June 2011 the applicants filed an urgent chamber application in HC 5268/11 in which they sought *inter alia*, an order for the stay of execution of the eviction order against them as well as restoration back into the premises in the event that their eviction would have been effected by the time that the matter was heard. In her justification that the matter ought to be treated as urgent, the first applicant stated *inter alia*:

- “3.1 Eviction is imminent and can be executed any time after seven days of delivery of the court order.
- 3.2 The eviction was obtained through misrepresentation to the court. The first respondent is not the owner of the property (*sic*). No explanation was proffered of the relationship between the first and third respondents serve (*sic*) to say the second respondent is a director of the third respondent and is a manager of the first respondent. The first and third respondents are clearly different entities and cannot represent the other. (*sic*)

- 3.3. The second applicant and myself would suffer great prejudice in that eviction would rob us of a roof in which we are in lawful occupation and misrepresentation has been used to obtain the eviction order and certificate of ejection.
- 3.4 ...
- 3.5
- 3.6 We have a right to remain in occupation until the right party institutes proceedings of eviction and that we are afforded a fair trial.”.

The matter was placed before a judge of this court who endorsed on the application as follows:

“The matter does not meet the requirements of urgency”.

On 6 July the applicant filed another urgent chamber application in HC 7967/11 for stay of execution and/or restoration of possession of the first respondent’s property. The application was reportedly dismissed for want of urgency.

On 22 August the applicants filed the instant urgent chamber application in which they seek interim relief of restoration of their occupation of 47A Dover Road Chisipite pending the determination of their appeal. In seeking to justify why the matter ought to be treated as urgent the first applicant stated *inter alia*:

- “4.1 Eviction is imminent and is in progress and would be finalised on Monday 22 August 2011
- 4.2 The first respondent is not the owner of 47A Dover Road, Chisipite, and hence has no *locus standi* to proceed with eviction.
- 4.3 The court orders obtained were done so through misrepresentation.
- 4.4 ...
- 4.5 If restoration is not granted we would suffer irreparable financial harm and great prejudice as we would be robbed of a roof though daylight misrepresentation.
- 4.6 ...
- 4.7 ...
- 4.8 We have a right to remain in occupation until the right party institutes proceedings for eviction”

At the time of the hearing of this application the two files HC 5268/11 and HC 7967/11 could not be located and I was unable to have sight of them before the hearing. File HC 5268/11 was finally located and brought to my desk after the hearing. Had I had sight of the files before then, I would not have set this matter down for hearing. This is so because it is clear that the applicants have been coming back to court with seemingly new urgent chamber applications when in fact they have already had their matter endorsed as not being

urgent. That is what happened in HC 5268 which I have had sight of. The first respondent contended that HC 7967/11 is virtually the same matter as in HC 5268/11 as well as the instant application. The relief sought as well as the justification for the alleged urgency is in effect the same in this instant matter as in HC 5268/11 which I have had sight of. It may be that the applicants being self-actors may not appreciate court procedure but the fact of the matter is that the filing of these urgent chamber applications on virtually the same matter and the same facts tends to indicate forum shopping on their part. It is because of the fact of them being self-actors that I do not consider it appropriate or necessary to make an award of costs against them.

The parties ventilated the matter in the magistrates' court where the eviction order was granted. Judgment was granted against the applicants. They appealed. Leave to execute pending appeal was granted to the first respondent. A warrant of ejection was duly issued and a notice of removal was also issued and served. The first respondent's actions in executing the eviction order are thus procedurally in order as the warrant in terms of which they were evicted was obtained after proper procedures had been followed and the writ is existant.

In any event, the applicants' challenge *in casu*, to the first respondent's *locus standi* in obtaining the eviction order against them is also one of their grounds of appeal, for determination by the appeal court. It is not, in my view, an issue for this court to consider in determining whether this matter ought to be treated as urgent and even if it was, the authorities do not appear, in any event to favour the applicant. For in *Robinson v Grimm*, 1996 (2) ZLR 73 (S) KORSAH JA stated at 85 E – G:

“The general rule of the common law is that a lessee may not dispute the lessor's title. This rule that a lessee may not dispute the lessor's title has been applied where a lessee, upon termination of the lease, refused to vacate the property. See *Loxton v Le Hanie* (1905) 22 SC 577 at 578, where BUCHANAN ACJ said:

‘The dependant has set up the defence that the title of the ground is in dispute, and, therefore, the magistrate has no jurisdiction. But it is not competent to dispute his landlord's title. ...’”

Thus even if it were to be considered for the purposes of determining urgency, the applicants' challenge of the first respondent's *locus standi* cannot, and on the facts of this matter, does not avail them.

For the above reasons I find against the applicants regarding urgency. This matter is not urgent. Each party shall bear its own costs.

Kantor & Immerman, first respondent's legal practitioners