MARYLOU PALALPAC MORTEN (NEE DACANAY)
versus
MARLENE DENISE KEMI MORTEN
and
TONY YOUNG
and
DANDARO HOME OWNERS ASSOCIATION

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 27 January, 1 February, 4 February and 15 February 2011

Urgent Chamber Application

C. Chinyama, for applicant
B. Diza, for 1st respondent
Advocate *J Lewis*, for 2nd & 3rd respondents

MAWADZE J: This is an urgent chamber application for a provisional order whose interim relief sought is couched as follows:

> "Interim Relief Granted
> That pending the return date respondent be and are hereby ordered to restore vacant possession and occupation of Flat 112 Dandaro Village, Borrowdale, Harare to the applicant with immediate effect".

The terms of the final order are construed as follows:-

> "1. That the first and second and third respondents be and are hereby ordered not to resort to self help and in so doing evict the applicant or lock her out or deny her access to Flat 112 Dandaro Village Borrowdale, Harare without an order of the court authorising them to do so.
>
> 2. That the first and second respondents jointly and severally with one paying the other to be absolved, pay costs of suit on attorney client scale".

Background Facts

It is unfortunate and perhaps deliberate that applicant did not seek in her founding affidavit to disclose all relevant background information related to the history and facts of this matter. Mr *Chinyama* for the applicant profusely apologised for the omission but was unable to give a plausible explanation for that considering that he had handled divorce proceedings and

three other urgent applications in this court involving the applicant, her late husband and virtually the same respondents. The need to state relevant and obvious background facts of the matter in any proceedings moreso in an urgent chamber application cannot be over emphasised.

The brief facts of the matter which I discerned after a full hearing can be summarised as follows:

Applicant married one Baker Eddy Morten at Harare on 16 February 2000 in terms of the Marriages Act [*Cap 5:11*]. Mr Baker Eddy Morten owned among other properties two residential flats Numbers 112 and 243 at Dandaro Village, Borrowdale Harare. Mr Baker Eddy Morten died in Florida USA on 9 August 2010 and his daughter the first respondent Marlene Denise Kemi Morten, a practising lawyer in USA was on 20 January 2011 appointed executrix testamentary of Baker Eddy Morten's estate.

The second respondent is the manager of the third respondent, an association of home owners at Dandaro Village governed by the Dandaro Home Owners Association constitution and also a notarial deed of servitude registered with the Deeds office regulating the rights and affairs of the members of Dandaro Village.

In August 2009 the late Baker Eddy Morten was in the USA receiving treatment after a road traffic accident. Applicant had returned to Zimbabwe from USA leaving Baker Eddy Morten in USA after being refused a residency permit by USA authorities. Applicant on 12 November 2009 filed for divorce in this court but the divorce proceedings were not brought to finality as Baker Eddy Morten died when the divorce proceedings were at pre-trial conference stage. Apparently when the late Baker Eddy Morten was in the USA for treatment the applicant moved into flat No. 112 Dandaro Village Borrowdale, Harare on 31 July 2010. This was after one M. Pisani occupying that flat had been removed by the first respondent who had been given power by Baker Eddy Morten to administer his affairs in Zimbabwe.

On 10 December 2010 (Baker Eddy Morten had died on 9 August 2010) Dandaro Home Owners Association through the second respondent wrote a letter to the applicant "ordering her" to vacate Flat 112 Dandaro Village forthwith. Two reasons were given in that letter. First, that the applicant was under age to be resident as Dandaro Village in terms of the third respondent's constitution. Second, that the applicant had been over an extended period of time since taking occupation of Flat 112 proved to be a nuisance to other residents and that the third respondent could no longer tolerate her.

Applicant, through her legal practitioners responded to this ultimatum to vacate Flat 112 by stating that the second and third respondents could not resort to self help by seeking to unlawfully kick her out from flat 112 without a proper court order. Applicant made it clear that she was staying put at flat 112 on the basis of being surviving spouse for Baker Eddy Morten.

The second and third respondents disregarded the applicant's protests and on 14 December 2010 the applicant through her legal practitioners wrote to first respondent's legal practitioners raising the issue that the first respondent acting in cahorts with the second and third respondents had evicted the applicant on 13 December 2010 from flat 112 by locking her out without a valid court order. Applicant approached Police at Borrowdale station for help as she argued that the conduct of first, second and third respondents amounted to spoliation. It would appear the applicant, with the help of the Police was able to re-occupy Flat 112 Dandaro. However the applicant's joy was short-lived as she was advised by the respondents to vacate Flat 112. This prompted the applicant to file an urgent chamber application on 15 December 2010 case No. HC 9293/10 seeking an interdict against the first, second and third respondents on the basis of her right as a surviving spouse to stay in flat 112 Dandaro and not to be evicted without a valid court order.

On 15 January 2011 HUNGWE J who dealt with the urgent chamber application HC 9293/10 dismissed with costs the application on the basis that applicant had failed to establish a *prima facie* right to reside at Dandaro Village taking into account the constitutional restrictions imposed relating to age and absence of written permission by the third respondent. HUNGWE J did find that the balance of convenience was in favour of the refusal of the interim interdict. In short, therefore HUNGWE J in HC 9293/10 declined to grant the applicant an interdict against first, second and third respondents.

On 20 January 2011 the first respondent who was appointed executrix testamentary was issued with letters of administration by the Master of the High Court DR 1718/10. On the same day, armed with the letters of administration the first respondent, with the assistance and indulgence of the second and third respondents now buoyed by this outcome of the case HC 9293/10 by HUNGWE J. proceeded to eject the applicant from flat 112 Dandaro Village. This then prompted the applicant on 24 January 2011 to again approach this court on an urgent basis seeking the provisional order referred to *supra*, which is now the subject matter of this judgment.

The basis of the applicant's case can be summed up as follows:-

1. that by evicting her from flat 112 respondents have committed an act of self help which is unlawful and have therefore illegally removed the applicant and her belongings from flat 112 in her absence and without her consent;
2. that by removing the applicant's property from flat 112 and kicking her out thus barring her from entering the flat the first, second and third respondents committed an act of spoliation which entitles applicant to the remedy of *mandamentum van spolie.*
3. that if the interim relief is not granted irreparable harm would be occasioned as applicant's property is unsecured, applicant has no other place to stay and that she has no other remedy.

The application is opposed.

At the commencement of the hearing the first, second and third respondents raised points *in limine*, which they submitted if properly considered dispose of the matter without consideration of the merits of the case.

Mr *Diza* and Advocate *Lewis* for the respondents basically raised three issues as preliminary points which are:

(a) that the application is fatally defective as the applicant failed to cite the first respondent in her official capacity/representative capacity and failed to comply with the peremptory requirements of r 248 of the court.

(b) the principle of *res judicata:*- that the same issues raised by the applicant in this urgent application were dealt with and pronounced upon by HUNGWE J in HC 9293/10 hence this court cannot be asked to revisit the same issues as it were .

(c) that the application is bad at law moreso in light of recent Supreme Court judgment *Commercial Farmers Union & Ors v Minister of Lands and Rural Resettlement and Ors* SC 31/10 which clearly stated that spoliation cannot confer jurisdiction where none exists and that the common law remedy cannot override an Act of Parliament nor can a court protect a party defying the law. The contention by the second and third respondents is that the notarial deed of servitude registered in Deeds Office under MA 406/2004 under the Deeds Registry Act which is an Act of Parliament cannot be rendered nugatory by the relief sought by the applicant.

Let me deal with the points *in limine* raised by the respondents seriatim

(a) Is the application fatally defective

The issues raised by the respondents in this respect as already said are two fold. I am however not persuaded by the submission that the non citing of the first respondent in her capacity as executrix testamentary of the estate is fatal to the application. The first respondent concedes that she evicted the applicant from flat 112 on 20 January 2011. In my view the fact as to whether she did so in her personal or representative capacity is neither here nor there and should not distract from the conduct complained of which is not in issue. In my case, Mr *Chinyama's* contention that applicant was unaware that first respondent had been issued with letters of administration has not been controverted.

The second aspect relates to no compliance with r 248(1) which provides:-

"Rule 248 applications involving deceased estates liquidators or trustees

(1) In the case of any application

in connection with __

(a) the estate of a deceased person.

or

(b) …….

a copy of the application shall be served on the Master not less than ten days before the set down for his consideration, and for report by him if he considers it necessary or the court requires such a report" (underline mine)

It is clear that the requirements of r 248(1) are mandatory. It is also common cause that Flat 112 now form part of the deceased estate of the late Baker Eddy Morten. It is not in issue that the applicant has not cited the Master in this application and has not complied with r 248(1).

In my considered view r 248(1) deals with applications in connection with an estate of a deceased person. In *casu* the application is not in connection with the estate of the deceased but relates to the alleged unlawful conduct of the respondents. The nature of the relief sought is not by any stretch of imagination related to the deceased estate nor can it be argued that if granted that would adversely affect the proper administration of the estate of the late Baker Eddy Morten. In my considered view the non citation of the Master in this application is not an issue at all. In view of the nature of the relief sought citing the Master would serve no purpose. In fact I am satisfied after a careful consideration of r 248(1) that it is inapplicable in the instant case hence I find no merit in this argument.

(c) Res judicata

As already explained this relates to the judgment by HUNGWE J in HC 9293/10. HUNGWE J's judgment was delivered on 20 January 2011 and this urgent chamber application was filed on 24 January 2011. However during the course of the hearing of this application and on 1 February 2011 Mr *Chinyama* filed an appeal with the Supreme Court against the judgment by HUNGWE J in HC 9293/10 appeal No. 23/11. The effect of such an appeal albeit noted during the hearing of this matter and most probably for purposes of countering the point *in limine* (*res judicata*) raised by the respondents remains self evident in that it suspends the operation of the judgment HC 9293/10.

My view is that even if no such an appeal had been noted the plea of *res judicata* would not be available to the respondents. It is clear that HUNGWE J in HC 9293/10 states that the applicant had no right to stay in Flat 112 Dandaro Village. To that extent the issue of whether the applicant has a right to stay in that flat can be said to have been adjudicated upon end settled. However the issue before HUNGWE J though involving the same parties and the same flat related to an interdict which is different from the relief being sought by the applicant *in casu*. For those reasons I find no merit on the issue relating to the principle of *res judicata* raised by the respondents.

(d) Whether that application is bad at law

My view is that this argument cannot be dealt with as a point in limine but rather relates to the merits of the application I now proceed to deal with the merits of the matter.

MERITS

From the background facts of the matter I have outlined it is clear to my mind that relevant facts to this application are largely common cause. These facts are:

(i) that applicant is the surviving spouse of the late Baker Eddie Morten. When Baker Eddie Morten passed on 9 August 2010 the marriage between the parties had not been dissolved by any competent court.

(ii) that applicant had been residing in Flat 112 Dandaro Village from 31 July 2010 and was only "evicted" from the flat on 20 January 2011 after a period of 6 months.

(iii) that the applicant did not consent to vacate flat 112 Dandaro Village but was locked out by the first, second and third respondents in her absence.

(iv) that the first, second and third respondents did not seek and obtain an eviction order from the court before ejecting the applicant from Flat 112 Dandaro Village.

It is incorrect to submit that HUNGWE J in HC 9293/10 ordered the eviction of the applicant. It follows therefore that it would not be tenable to argue that the applicant was lawfully evicted in accordance with an order by HUNGWE J in HC 9293/10. The fact of the matter is that HUNGWE J in HC 9293/10 merely pronounced on the rights of the parties in relation to Flat 112 Dandaro Village. HUNGWE J did not issue an order to evict the applicant and no such order was sought before him but the relief sought was an interdict.

The fact of the matter is that the judgment by HUNGWE J in HC 9293/10 did not in my view allow the respondents to evict the applicant without a valid court order to that effect.

The next issue to consider therefore is whether the respondents acted upon any other lawful basis when they evicted the applicant on 20 January 2011.

Section 10 of the Deceased Family Maintenance Act [*Cap 6:03*] provides as follows:-

"10 Protection of deceased person's family and property.

(1) Notwithstanding any law, including customary law, when any person dies, any surviving spouse or child of such person shall, subject to section eleven have the following rights –

(a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased.

(b) ……..

(c) …….

(d) …….".

In terms of s 10(2) non compliance with the provisions of s 10(1) invites criminal sanctions.

As already stated applicant is Baker Eddy Morten's surviving spouse and Baker Eddy Morten owned Flat 112 Dandaro Village Borrowdale, Harare. It is common cause applicant was occupying Flat 112 Dandaro Village immediately before the death of the deceased.

Applicant therefore is protected in terms of s 10 of the Deceased Person's Maintenance Family Act subject to s 11 of the same Act.

Section 11 of the Deceased Person's Family Maintenance Act states:

"11 Restrictions on exercise of the rights conferred by section ten.

The rights conferred by section ten shall-

(a) not derogate from or prejudice in any way the rights of the mortgagor or, landlord, creditor or any other person whomsoever which existed prior to the date of the death of the deceased person. (underline mine).

(b) terminate upon completion of the administration of that portion of the deceased estate to which those rights relates.

(c) be subject to the requirement that the surviving spouse or child concerned shall occupy or use the property in question without detriment, or neglect, reasonable wear and tear being excepted".

Advocate *Lewis* in argument submitted that the applicant's right to occupy flat 112 Dandaro Village is subject to the exception in s 11(a). I associate myself with that view and I believe the effect of the Dandaro constitution and the notarial deed of servitude on applicant's right to occupy flat 112 Dandaro were issues ably dealt with by HUNGWE J in HC 9293/10.

The graveman of the matter is whether the respondents acted within the confines of the law when they ejected the applicant.

The legal requirements for the relief sought by the applicant are well laid out in the case of *Chisveto v Minister of Local Government and Town Planning* 1984(1) ZLR 248 at 250 A to E;

> "It is a well recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was forcible or wrongful interference with his possession of that thing …. that *spoliatus ante omnia restituendus est*…….. Lawful possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of claims of each party. Thus it is my view that the lawfulness or otherwise of applicant's possession of the property in question does not fall for consideration at all".

I am satisfied that the applicant has proved both factual possession and wrongful dispossession in respect of flat 112 Dandaro Village. Even if one was to assume that the applicant's right to occupation of the flat 112 is as per HUNGWE J's judgment (I share similar

views) in HC 9293/10 I do not believe that the respondents were entitled to eject her from the flat without following the due process of the law. The provisions of the Dandaro constitution and the notarial deed of servitude deal with the applicant's right to habitatio and cannot be elevated to the status of a court order authorising the eviction of the applicant. I associate myself with the incisive views expressed by the Chief Justice CHIDYAUSIKU in the matter of *Commercial Farmers Union and Ors v Minister of Lands and Rural Resettlement and Ors* SC 31/10 cyclostyled judgment at p 29:

> "The holders of offer letters, permits or land settlement leases (one may read to include Dandaro Constitution, the notarial deed of servitude and letters of administration) are not entitled as a matter of law to self help. They should seek to enforce their right of occupation through the courts ……."

I am therefore satisfied that the applicant is entitled *prima facie* to the interim order she seeks.

Accordingly, I make the following order:-

1. That pending the return date the respondents be and are hereby ordered to restore vacant possession and occupation of flat 112 Dandaro Village, Borrowdale, Harare to the applicant with immediate effect.
2. This provisional order shall be served on all respondents in terms of the rules of this Honourable Court.

Chinyama & Partners, applicant's legal practitioners
Musunga & Associates, 1st respondent's legal practitioners
Advocate J.C. Lewis, Counsel for 2nd & 3rd respondents