

STREAMSLEIGH INVESTMENTS (PRIVATE) LIMITED

versus

AUTOBAND INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

BERE J

HARARE, 30 November 2011 & 6 February 2012

Opposed application

Adv A.P. de Bourbon Sc, for the applicant (Instructed by Ms B. Mtetwa)

Adv Uriri, for the respondent (Instructed by J. Samukange)

BERE J: This case has been triggered by the developments in a case involving the respondent in the Magistrates Court which was heard and concluded in favour of the respondent on 11 October 2011. The lower court case bears reference number MC 16435/11.

The respondent, having succeeded in the lower court sought execution on the order obtained. The execution process could not proceed smoothly as the other part involved with the respondent in the lower court appealed against the decision made thereby prompting the respondent in the instant case to apply for leave to execute pending appeal which decision again found favour with the lower court.

Faced with the possibility of an imminent eviction from the property at the centre of the dispute between the parties in the lower court, the applicant in the instant case, despite its alleged claim of not having been party of the proceedings in the lower court filed the instant urgent application seeking the following interim relief as per its proposed draft order on p 320 of its papers;

“IT IS DECLARED THAT:

1. The eviction order granted by the Magistrates court, Harare in the matter between Autoband Investment (Private) Limited t/a Trauma Centre v African Medical Investments PLC under case number MC 16435/11 be and is hereby declared to be of no force, effect or application as against applicant.
2. The respondent be and is hereby banned and interdicted from evicting or in any other way interfering with the applicant's agents, employees, occupation and possession of the premises known as stand number 2924 Salisbury Township of Salisbury Township Lands situated at Number 15

Lanark Road, Belgravia, Harare utilizing the eviction order granted in case number MC 16435/11.

3. The respondent pays costs of this application *deboris propriis* or an attorney client scale.”

So much has been thrown in this application but I understood applicant’s counsel to have raised two fundamental issues which have prompted the applicant to seek the declaratory order cited above.

The main thrust of the applicant’s counsel’s argument is that the respondent in the instant case has demonstrated lack of faith or confidence in this court by failing to prosecute to finality two matters which were instituted by the respondent in this case, viz HC 619/11 and case HC 2125/11. Counsel’s argument as expanded was that it was wrong for the respondent to embark on forum shopping by taking the same dispute in the Magistrates Court under case MC 16435/11. Counsel accused the respondent of adopting a casual or lackadaisical attitude in handling the two High Court matters.

I did not find this argument to be compelling for basically two reasons: firstly, when the respondent took its case for eviction to the lower court, it made a full disclosure of the pending High Court matters in its founding affidavit. A simple perusal of the founding affidavit of Dr *Vivek Dolanki* (for the applicant in the lower court) explained in greater detail on p 57 of the consolidated record the existence of the two High Court matters alluded to by the applicant’s counsel in the instant matter. The affidavit lays bare why a new application for eviction was being preferred in the Magistrates’ Court despite there being two other matters pending in the High Court. By making such disclosures, the now applicant was given sufficient opportunity to respond to such issues which it did on p 64-65. The lower court must have considered these submissions before it made a determination of the application for eviction.

Secondly, where an applicant to proceedings initiated by application procedure demonstrates a casual attitude in the finalisation of the proceedings, there is a procedure laid down which the respondent can initiate to bring the proceedings to finality to the detriment of the applicant. Order 32 r 236 3 (a) & (b) gives the respondent sufficient ammunition to bring litigation to finality in such a situation. The respondent in the two High court matters has not

been proactive in finalising the two High Court matters. In *Anchor Ranging (Pvt) Ltd*¹, I dealt with an almost similar situation and explored the procedural approach as perceived.

The respondent (applicant in the Magistrates Court), having disclosed about the two High court matters and having explained the reasons why it was initiating a new eviction case in the lower court cannot be condemned for so acting.

The other argument which was raised by the applicant's counsel was that the Magistrates' Court did not have jurisdiction to deal with the matter. I did not take this submission seriously as the lower court addressed this issue in its judgment as evidenced by the judgment of the lower court attached as Annexure H on p 132 of the bound papers.

The third argument which was also raised by the applicant's counsel was that the application brought by the respondent in the lower court did not cite the applicant as a party to the proceedings and therefore the intended eviction might be targeted at the wrong and innocent party.

I have extreme difficulties in following this argument if regard is had to annexures VS1 – VS5 being the official documents which were alleged to have been used by the applicant at some stage. See pages 335 – 342 of the bound record of proceedings.

Even if one were to assume that indeed the now respondent had targeted the wrong party in its eviction proceedings, I find it rather strange that despite it being fully aware of the existence of the proceedings in which it purports to have an interest in, the applicant did not see it fit to apply for joinder, in the lower court. An application for joinder would have given the applicant sufficient ammunition to protect the interest which it now seeks to protect. Even more curious is the fact that even in all those cases which are still pending in the High Court, the applicant has not filed for joinder.

The failure by the applicant to formally seek for joinder in both the Magistrates court, and the High Court, in my view casts sufficient doubt on the *bona fides* of its application for a declarator, more so if one considers annexures VS1 – VS5 earlier on referred to.

I am extremely concerned with the approach being advocated by the applicant in this case. It wants this court to grant a declaratory order to subvert a process that started in the lower court in which it, actively participated and lost. I see that as nothing but a stout effort to indulge in forum shopping and the High Court must not be used to subvert court process emanating from the lower court for no good cause. I agree with the forceful submissions made by *Adv Uiri* that in these circumstances a declaratory order would not be competent.

¹ *Anchor Ranging (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor* 2008 (2) ZLR 246 AT 248

Before concluding this matter, I wish to observe that the applicant has placed so much emphasis on the ownership of stand 2924 Salisbury Township of Salisbury Township Lands (No 15 Lanark Road, Belgravia, Harare). The application for eviction had nothing to do with the ownership of the property but was restricted to the possessory writs of the applicant in the lower court. Again this issue was dealt with by the lower court in its judgment referred to above. The lower court made a specific finding that the now respondent had been unlawfully dispossessed of the property. The applicant exercised its right of appeal against the decision of the lower court and certainly it was not competent for the applicant to apply for a declaratory order in order to short circuit the appeal process.

Finally, the identity of the property in issue has never been an issue in these proceedings and it cannot become a hot issue at the time of execution. All the parties in this case are fully aware that the property in issue is commonly referred to as No. 15 Lanark Road, Belgravia, Harare registered as stand No. 2924 Salisbury Township of Salisbury Township Lands.

In conclusion I am more than satisfied that this application was motivated by nothing really other than to unprocedurally and unfairly interfere with a legitimate lower court process. It is clearly an attempt to undermine the authority of the lower court. The same arguments raised in the lower court are being recycled in this court. This approach is unacceptable.

COSTS

The question of costs is largely at the discretion of the court despite what the parties desire. But the discretion of the court must be judiciously exercised.² A litigant who with his eyes open deliberately abstains from taking corrective action or has participated in and lost in the court *a quo* cannot initiate process in the High Court in order to obstruct or circumvent the natural consequences associated with losing a case. Such spurious litigation must be discouraged and only a punitive order of costs would send the message loud and clear.

Consequently the application is dismissed with costs on Attorney Client scale. Following from this decision, the provisional order is automatically discharged.

² Kruger Bros and Wasserman vs Ruskin 1918 AD 63 at 68

Messrs Mtetwa & Nyambirai, applicant's legal practitioners
Messrs Venturas & Samukange, respondent's legal practitioners