

NEWTON ELLIOT DONGO
versus
BABNIK INVESTMENTS (PVT) LTD
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 9 & 10 February, 21 June 2017

Urgent Chamber Application

Applicant, in person
Ms Gasa, for 1st respondent

CHAREWA J: The applicant filed an urgent chamber application for a provisional order stay of eviction as interim relief and a final order that he should remain in peaceful occupation of immovable property known being stand number 107 of Salisbury Township, also known as number 102 Harare Street, Harare.

I heard the application on 10 February 2017 and dismissed it with costs, giving reasons *ex-tempore*, in the presence of the applicant, for lack of urgency and *locus standi* by the applicant.

On 22 May 2017, three and a half months later, the applicant wrote to the Registrar requesting the reasons for my decision, which I render hereunder.

The facts

Stand 107 of Salisbury Township belonged to the late Sushila Natverlal Naik whose estate was duly registered on 9 May 2016 and administered under the Master's supervision to its final conclusion. (Letters of Administration issued to deceased's son Joytindra Natverlal Naik dated 22 June 2016 refer). As part of the finalisation of the administration of the estate, the property was disposed of to the first defendant on 21 July 2016.

Upon finalisation of the administration of the estate and the disposal of the estate property, three months' notice was properly given to the legal tenant, Goldpack Investments (Pvt) Ltd and all those claiming occupation through it, to vacate the property in favour of the

new owner. Upon failure of the occupants to vacate, the matter went before the Magistrates Court which granted an order of eviction on 3 February 2017.

Prior to her death, the deceased had leased the property for five years commencing 1 November 1999 to 31 October 2004, to Goldpack Investments (Pvt) Ltd. The terms of the lease agreement did not allow for subletting or cession without the deceased's consent.

Contrary to the lease agreement and subsequent to the deceased's death, Goldpack "ceded" its rights to a company called Clintvest Investments (Pvt) Ltd. While the directors of the two companies were the same, the companies were and are separate legal entities.

Clintvest subsequently allegedly sublet to several flea market stall holders as is apparent from Magistrates Court Case No. 41044/2016. Applicant's name is not included as one of the stall holders in that matter though he swore an affidavit on their behalf, the basis of which is unclear. Nothing on the record or in previous litigation support that applicant was also a stallholder and subtenant of Clintvest.

The applicant instituted the present application on his own behalf as appears from his founding and "supplementary founding affidavit" (*sic*). However, he purports to speak for other subtenants without laying the basis for doing so.

When the parties appeared before me on 9 February 2017, I noted challenges with the draft order which the applicant sought; the interim order of which was to the effect that pending the determination of the urgent application before me, execution of any judgment of a magistrate court seeking his eviction be stayed in circumstances where the applicant had already been evicted. Further I could not grant any order pending the determination of the very application before me. In addition the final order sought continued peaceful occupation pending the determination of his application for a declaratory order that the sale of the property was invalid, when applicant was no longer in occupation.

I also noted that the applicant had not properly laid the basis for seeking that the matter be heard on an urgent basis or established his *locus standi* to bring the application.

With the consent of the first respondent, I therefore directed the applicant to attend to his draft order to seek reinstatement of occupation and stay of any further execution thereafter. In addition, I granted the applicant the indulgence, if necessary, to file a supplementary affidavit regarding 1) this change in the draft order, 2) to traverse the issue of urgency, the requirements of which were explained to him, and 3) to establish his *locus standi* after which the first respondent could file its opposing affidavit.

On the next hearing date on 10 February 2017, applicant submitted a supplementary founding affidavit which was effectively a new application for an interdict, bringing up new issues rather than reinstatement of occupation and stay of further execution contrary to the directions of the court.

Being mindful of the fact that applicant was a self-actor, I however allowed the parties to make submissions on urgency and *locus*.

Reasons for judgment

At the conclusion of the parties' submissions I dismissed the application on the basis that firstly, it was not urgent, and secondly and in any event, the applicant lacked the *locus standi* to bring this or any other application in the matter, and these were my reasons:

Urgency

On urgency, the applicant submitted that he was being evicted and had in fact been evicted by someone with improper title. He averred that he should not be evicted until the issue of propriety of the administration of the estate of Late Sushila Naik was resolved.

In his affidavit of urgency at page 17 of his application, applicant averred that the matter was urgent because

1. He had "been served with a writ, default judgment and notice of removal to take place on the 9th of February 2017"...
2. He "was not cited in the matter....threatening (his) rights in the premises and ...was not given the opportunity in the magistrates court to defend (his) rights"
3. Unless this court intervened, he stands "to suffer repairable (*sic*) harm and it is clear that the 1st Respondent approached that (*sic*) Court with dirty hands by citing a party which is not in occupation and has ceased to have an interest in the premises".
4. "...1st Respondent has abused the lower court by seeking such an order (presumably the order of eviction) when there is a case HC137/16 pending..."
5. "The reasons why 1st Respondent has acted in such a manner is thatWe both sale (*sic*) electrical goods and hardware and so he wants to kill competition."

It is apparent that applicant advanced no grounds at all why his application should be treated as urgent. In fact, by his own admission, he knew by, at the very least, January 2017, that the first respondent had acquired title and intended to convert the property for its own use. And as at that date, he had long been aware that in 2016, first respondent had instituted

eviction process against the legal tenant, Goldpack, and all those claiming occupation through it. If applicant had any rights to protect, then the need to act arose, at the latest, then.

As it turns out, and according to documents in applicant's possession and paragraph 5 of his supplementary founding affidavit, as at 25 August 2016, all subtenants at 102 Harare Street were given notice by Clintvest that the property had been sold and that they had to vacate within three months. They sought an extension of the notice period to the end of December 2016, which was turned down by letter dated 16 November 2016.

At the earliest therefore, applicant was, as from 25 August 2016, always aware that the property had been sold as a consequence of the administration of the estate and he was required to vacate in favour of the new owner. The need to act arose then, should applicant have had any remedy against first respondent, and not as at the date of eviction by the messenger of court.

Instead of seeking to protect his alleged rights to occupation, what applicant did in fact was to seek to impugn the administration of the estate of Late Sushila Naik, in letters dated 21 & 29 December 2016. In response the Master informed him, by letter dated 11 January 2017, to approach the courts for a review of the administration of the estate as it had been finalised. Contrary to the advice from the Master, what the applicant did was to seek a *declaratur*, a month down the line. Thus, he himself did not treat his own cause as urgent.

Besides, execution of judgment being the natural consequence of an order of court, and the applicant having already been evicted, it is a principle of our jurisprudence that once the status *quo ante* has been lost, it can generally not be restored, unless there is a palpable miscarriage of justice, which is not apparent in this case.

Clearly, this matter did not deserve to be treated as urgent as it fell far short of the requirements necessary to jump the queue and take precedence over other matters.

Locus standi

Even, had urgency been proved, the applicant faced the further hurdle of establishing his *locus standi* to bring this application.

At the same time that the subtenants were denied an extension of the notice period, they were informed that their landlord, Clintvest, was in fact an illegal tenant, and they, as its subtenants, had no nexus with first respondent. Applicant does not dispute that he was a subtenant of Clintvest. In fact he asserts that he should have been given notice by that company, which is indeed what happened in terms of paragraph 5 of the supplementary founding affidavit aforesaid.

What he may not have known was that Clintvest had no right to receive cession from Goldpack, contrary to paragraphs 8.2 and 8.8 of Goldpack's lease agreement with the late Sushila Naik. And if Clintvest did not have any legal rights flowing from a valid cession, then neither could it give any rights to him greater than its own rights. *Ergo*, applicant's claim stands on nothing, a truism which the courts have underscored time and again.

In any event, the fact that the magistrates court ordered eviction of Goldpack and all those claiming occupation through it, equally applied to applicant as he staked his claim on a cession of its rights by Goldpack to Clintvest. That order is still extant and has not been appealed. Applicant therefore remains evicted in terms thereof.

In fact, the applicant stands on very tenuous ground. His tenancy even from Clintvest is in question; else he would have produced his own copy of notice to vacate. He has produced no proof of stock that he sells or intends to sell on the premises, nor has he any lease or receipt that he was paying any rent to Clintvest. Case number 41042/16 carries no reference to him whatsoever, nor does the affidavit of Mr Morar, the representative of Clintvest. The presumption is that applicant is a mere opportunist who cannot claim any right of occupation let alone any *locus* to assert any rights over the property at all.

Applicant is relying to a large extent on the propriety of the administration of the estate of Late Sushila Naik which he queries in HC 137/16, by refusing to vacate the premises, alleging that the 1st respondent bought the property from a person not entitled to sell it (See paragraph 6 of his founding affidavit) and that since he was in actual occupation he ought to have been given right of first refusal.

Note must be made that in terms of the Master's report, there was nothing untoward in the administration of the estate. In any event, only persons with an interest in the estate are entitled in terms of the Administration of Estates Act, [Chapter 6:01] to seek a review of such administration. Further, case law has laid down the criteria for enabling a party to seek participation in on or review of any matter.¹

Consequently, the relief sought in HC 137/16 is unlikely to have any reasonable prospects of success as applicant *prima facie* does not appear to be an interested party in the due administration of the estate of late Sushila Naik. Since there is no nexus between Estate

¹ See *Bindura Nickel Corporation v Zimbabwe Revenue Authority* HC 03/08 where it was held that for a party to sue, it must have a direct interest. See also *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07 where the Supreme Court held that a party must justify participation predicated on direct and legal interest.

Late Sushila Naik and applicant, there can be no direct and legal interest in the administration of her estate by applicant.

Following on this, there cannot arise any right of first refusal in favour of applicant, which right can only be created by agreement between the two parties concerned.²

In the premises I dismissed the application with costs for lack of urgency and *locus standi*.

Gasa Nyamadzawo & Associates, 1st respondent's legal practitioners

² See *Eastview Gardens v Zimbabwe Reinsurance Co* SC 90/02.