RITA MARQUE MBATHA
versus
VINCENT NCUBE
and
MESSENGER OF COURT, HARARE

HGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 1 November and 18 November 2021

Urgent Chamber Application

Applicant in person
First Respondent in person
E. T Moyo, for the second respondent

MUCHAWA J: This is an urgent chamber application for an interdict against first respondent to restrain him from evicting the applicant through the second respondent. The applicant is a tenant of the first respondent as she currently resides at house number 126 Edgemore Road, Park Meadowlands, Harare (herein after called the property) , which belongs to the first respondent. On 19 October 2021, the applicant was served by the second respondent, with a Notice of Removal which was based on case number 39520/16 from the Magistrates Court whose execution date was given as 22 October 2021. This prompted the filing of this urgent chamber application.

The terms of the order sought are given as follows:

"TERMS OF FINAL ORDER SOUGHT
That you should show cause to this Honorable Court why a final order should not be granted on the following terms:

1. The First Respondent and Second Respondent and all those acting through them are hereby ordered not to interfere with the applicant's control and occupation and possession of 126 Edgemore Road, Park Meadowlands, Hatfield,Harare.
2. First and Second Respondents to pay costs of this application.

INTERIM RELIEF GRANTED

WHEREUPON after reading documents filed of record and hearing Counsel for the parties, it is ordered that:

1. The First respondent and Second respondent and all those acting through them are interdicted from evicting the applicant.
2. First and Second Respondents to pay costs of this application."

Both respondents were opposed to the application sought. I heard the parties and reserved my judgment on both points *in limine* and the merits. This is it, starting with the points *in limine*.

Points *In Limine*

The first respondent had raised the point *in limine* that the matter was not urgent. This point was however abandoned in favour of disposing of the matter on the merits. Surprisingly, the applicant ended up being the one to raise five points *in limine*. One would have thought that it was in the applicant's interests to decisively deal with the matter on the merits as she was the one who had dragged the respondents to court. The points raised were listed as;

1. The exception *res judicata*
2. Aiding and abetting disobedience of a court order
3. Criminal Act: Instruction to evict and notice of removal
4. Dirty hands principle
5. Contempt and propensity to commit fraud

I deal with each of these hereunder.

The exception *res judicata*

The applicant submitted that the Court already expressly ordered in case HC 7310/18 that respondents should not interfere with her control and possession of the property and this attempt to evict her was contemptuous as the court could not recall, vary or add to its own judgment as a final adjudication had already been made.

The first respondent submitted that he had relied on the Supreme Court judgment 19/18 to resuscitate the writ against the applicant as the order dismissed the stay of execution in the Magistrates Court and directed that the appeal lodged before the Supreme Court be heard on the earliest available date.

Mr *Moyo* protested that the *res judicata*, being a defense is open to the respondent and cannot be raised as a weapon by a plaintiff or applicant who has approached the court for relief and invoked the jurisdiction of the court. It was argued that the point was in fact, improperly

raised as the applicant was in essence barring the court from hearing the merits of a matter she had brought to the court's attention.

Indeed the exception or defense of *res judicata* falls open to a defendant or respondent in a matter, to be properly raised as a point *in limine*. See the case of *Shamrock Holdings Limited T/A Inyathi Hunters* v *The Minister of Environment and Tourism NO & 2ORS* SC 21/10;

> "The requisites for a valid defense of *res judicata* in Roman Dutch Law are that the matter adjudicated upon, on which the defense lies, must have been for the same cause between the same parties and the same thing must have been demanded."

The applicant therefore improperly raised this point which is best dealt with under the merits of the case. I will not detain myself on it.

The rest of the points *in limine*

In the rest of her points *in limine*, the applicant was alleging impropriety on the part of the first and second respondents. It was averred that they had aided and abetted each other in disobeying the order of the High Court in case HC 7310/18, amounting to contempt of court. The applicant submitted that what had happened amounted to a criminal act as the instruction to evict and notice of removal were based on a void order and the first respondent had failed to pay fees for the intended removal but had colluded with second respondent in order to benefit unlawfully. It was alleged that the first respondent had propensity to commit fraud as he had done previously before the Rent Board. The respondents were said to have dirty hands and it was argued that they should not seek the court's assistance.

The first respondent denied all the allegations levelled against him whilst Mr *Moyo* once again pointed to the impropriety of the applicant raising the point of dirty hands against respondents she has dragged to court. He denied that the second respondent was aiding and abetting disobedience of a court order. His argument was that the order in HC 7310/18 which was neither an appeal nor review, could not have set aside the warrant issued by the Magistrates Court. It was also contended that the applicant, who is a self-actor had improperly raised factual issues alleging criminal conduct in heads of argument leaving the respondents with no opportunity to rebut same.

I agree with Mr *Moyo* that the allegations of criminal conduct as raised in the heads of argument were improperly raised as the respondents were denied an opportunity of rebuttal. The

dirty hands principle was also improperly raised as the applicant is responsible for dragging them to court. She cannot then seek to bar that they be heard.

The issue of whether there was disobedience of a court order stands to be determined in the merits of the matter whilst the allegations of the first respondent's propensity to commit fraud is not really before me and does not have the effect of disposing of the matter. This too was unfortunately raised in heads of argument. Granted, the applicant is a self-actor. She however should not just raise points *in limine* for the sake of raising them as this unnecessarily wastes the court's time which is already hard pressed. I can do no better than cite from the case of *Telecel Zimbabwe (Pvt) Ltd* v *PORTRAZ & Ors* HH 446/ 15 by MATHONSI J, as he then was:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis."*

Though the applicant is not a legal practitioner, she has brought multiple applications and actions before this court and others. She should be warned that points *in limine* are not to be raised as a matter of fashion when they are not merited nor likely to dispose of the matter. All they do, is waste the Court's time. I therefore dismiss the points *in limine* for the reasons already set out above.

The Merits

In order to put this matter in its context, I will give a brief background. The genesis of several matters in which the parties herein have been fighting it out severally before this court and the Supreme Court, is an order for the eviction of the applicant from the property which was secured from the Magistrates Court on a date which has not been supplied, as a default order, in case no. 39520/16. Because of the multitude of matters then launched by the applicant, I have done my best to piece together what is relevant for this matter though I may not piece the pieces of this puzzle in the most clear and chronological manner. This is partly because the applicant has not done so herself and I have had to peruse several files to get an idea of this long and

winding tale. After the eviction order, an application for rescission of that order was dismissed before the Magistrates Court.

An application for review was filed in the High Court on 16 August 2017 under case number HC 7542/17. Therein, it was alleged that the Magistrates Court had not afforded the applicant a fair hearing as an opportunity to file an answering affidavit had been denied.

Under case HC9296/17, the applicant filed an urgent chamber application for stay of execution pending the hearing of the application for review and a stay of execution case in the Magistrates Court under case MC 39520/16. Both the application for review and this urgent chamber application were withdrawn on 17 August 2018 as the applicant was of the view that the relief she had obtained under HC 7310/18 adequately dealt with her grievances.

Case HC 7310/18 was an urgent chamber application for a spoliation order and interdict against the respondents herein. It was the applicant's case that the respondents, on 7 August had ordered her out of the property and thrown her property onto the street based on the Magistrates Court order which was the subject of a challenge under the application for review. She averred that the Magistrate who had presided over the matter had no jurisdiction, amongst other things.

The terms of the order granted to the applicant in this matter, on 9 August 2018 as provisional order and on 12 September as a final order are set out below.

INTERIM RELIEF GRANTED

That pending the determination of this matter, the applicant is granted the following relief:

1. The 1st and 2nd respondents and all those acting through them shall facilitate the applicant to take occupation and possession of 126 Edgemore Road, Park Meadowlands, Hatfield Harare without any let or hindrance.
2. The second respondent shall restore to the applicant's possession the Kipor KDE Toot Diesel Generator, Capri 2- door upright refrigerator, 3 grey LG television s and the Hisense plasma colour television that he disposed her of on 7 August 2018.

FINAL ORDER GRANTED

1. The respondents be and are hereby ordered not to interfere with the applicant's control and occupation and possession of 126 Edgemore Road. Park Meadowlands, Hatfield Harare.

2. The first respondent pays the costs of suit.

It appears that, however on 5 October 2017 when the applicant was facing imminent eviction on 6 October 2017, she filed an urgent application for stay of execution in the High Court pending finalization of the review. That application was dismissed and the applicant noted an appeal to the Supreme Court under SC 847/17. Apparently the applicant was faced with another notice of removal to be effected on February 2018. A chamber application was then filed with the Supreme Court under case SC 97/18 in which a stay of execution was sought pending determination of the appeal as well as the decision of the High Court under case number HC 9296/17. The Supreme Court on 10 May 2018 dismissed the application for stay of execution of the Magistrates' Court order and ordered the registrar to set down the appeal for hearing at the earliest available date. The appeal was subsequently heard on 17 May 2018 and it was allowed with costs. The decision of the High Court which had dismissed the urgent application for stay was set aside and substituted as follows;

> "The matter not being urgent, be and is hereby removed from the roll of urgent matters with no order as to costs."

This matter which had been referred to the ordinary roll is what the applicant withdrew on 17 August 2018 under case HC 9296/17. Mr *Moyo* submitted that there is currently no stay of execution in both the Supreme Court and High Court if regard is had to the Supreme Court judgment SC19/18 which dismissed the application for stay of execution and that applicant withdrew the application for stay which was pending before the High Court as she did the application for review.

It is the applicant's case that the final order in case HC 7310/18 rendered the eviction order from the magistrates' court under case MC 39520/16 void and it cannot be the basis for a further eviction. The first respondent claims that the Supreme Court order which dismissed the stay of execution is the basis for the fresh eviction bid. Mr *Moyo* argued that the order under HC 7310/18 does not bar parties in perpetuity as the Magistrates Court order was neither set aside in an appeal or review and therefore remains *extant*. The question to be decided is whether the order under HC 7310/18 invalidates the Magistrates eviction order.

Herbstein and Van Winsen in The Civil Practice of the High Courts of South Africa, Juta, 5th Edition state on page 1271 as follows:

> "The reason for bringing proceedings under review or appeal is usually the same, *viz* to have the judgment set aside."

In casu the eviction order was not set aside by review as the review application was withdrawn and the applicant did not lodge an appeal against the eviction order. The eviction was order was therefore not set aside in the usual ways. What is the effect of the final order granted in HC 7310/18?

Mr *Moyo* submitted that that the order under HC 7310/18 did not and cannot at law interfere with or set aside the eviction order because the High Court was not seized with either an appeal or review but the narrow remit was an allegation of spoliation wherein it was alleged that the applicant had been dispossessed outside due process. It was argued that the spoliation order must be understood in that context.

In case HC 7310/18 the court was seized with determining whether the applicant had been in peaceful and undisturbed possession of the property and had been unlawfully dispossessed. That is the case that was in fact made by the applicant. In her founding affidavit, in paragraph 9, she set out the nature of her application as follows:

> "This an urgent chamber application seeking in the first instance an order barring respondents from illegally auctioning property tomorrow (09.08.2018) forcibly removing the applicant and family and restoring the status quo ante prior to the illegal events of 07 August 2018 which shall be narrated hereunder. And in the second instance interdicting the respondents, in particular the first respondent from occupying 126 Edgemore Road, Park Meadowlands, Hatfield, Harare."

It was in relation to that application that this final order was issued,

1. " The respondents be and are hereby ordered not to interfere with the applicant's control and occupation and possession of 126 Edgemore Road, Park Meadowlands, Hatfield, Harare.
2. The first respondent pays costs of suit."

The function of the court is to determine the disputes placed before it by the parties. It cannot go on a frolic of its own. See *Chiwenga* v *Mubaiwa* SC 86/20. In HC 7310, the court was seized with an application for a spoliation order relating particularly to the events of 7 August 2018. The spoliation order could only have determined the immediate rights of possession of the property pending the finalization of the application for review and the stay of execution and related appeals thereto. The law is settled that an order of spoliation is final in nature and that it determines the immediate right of possession of a particular *res.* It is frequently followed by further proceedings between the parties concerning their rights to the property in question. See the case of *Botha and another* v *Barrett* 1996 (2) ZLR 73 (S) where at p77E, the requirements of a spoliation order are stated.

The legal remedy of *mandamus van spolie* has been part of our law for generations. Its scope was admirably summarized in the old Transvaal full bench decision of *Nino Bonino v De Lange* 1906 TS 120 at p 122 where INNES CJ stated:

> "It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear."

The above authorities make clear that the court in HC 7310/18 concerned itself with righting the wrongful possession. The key facts averred by the applicant in the application HC 7310/18 were as follows:

1. That she was in peaceful and undisturbed possession of the property since the setting aside of the High Court order under case SC 847/17. I have already related to the effect of the Supreme Court order. It simply allowed the applicant's appeal in which an appeal had been lodged against the dismissal of an urgent application to the High Court. In the judgment of *Rita Mbatha & Anor V Vincent Ncube & Anor* SC 19/18 on p 6 MAKARAU JA, as she then was summarized succinctly what was before the court,

   > "The appeal to this Court as stated above challenges the correctness or otherwise of the High Court decision denying stay of execution of the Magistrates' Court judgment pending determination of the review application. Assuming that the appeal succeeds, this Court will grant stay of execution of the judgment of the Magistrates' Court pending determination of the review application as this was the relief that was denied the applicants by the court *a quo*. "

When the appeal was then heard, the Supreme Court did not grant stay of execution. The order substituting the High Court Order was stated as follows;

> "The matter, not being urgent, be and is hereby removed from the roll of urgent matters with no order as to costs."

This simply means that the matter of stay of execution before the High Court was confirmed as not being urgent and was referred to the ordinary roll. This was the matter under case HC 9296/17 which applicant then withdrew on 17 August 2018.

2. The further averments of the applicant related to a bond of indemnity stamped by the High Court on 21 June 2018 which did not cite the Supreme Court proceedings under SC 847/17 and that there had been a misrepresentation on the fate of that application. This is

no longer a factor related to *in casu* and I have already covered the implications of SC 847/17.

3. The applicant also made reference to the pending application for review in HC 7310/18, which matter has since been withdrawn too as stated in applicant's answering affidavit.
4. The applicant further averred that she held a lease agreement which was expiring on 1 October 2021. That agreement has since expired.

It is clear that all the factors upon which the Court acted in giving the spoliation order to the applicant on 12 September 2018, no longer exist.

It cannot be successfully argued, in the circumstances that the application for a spoliation order dealt with what a court on appeal or review would have dealt with. The applicant's plea of *res judicata*, though improperly raised, would not have succeeded.

It is my finding that the spoliatory relief could not apply in perpetuity. It was meant to restore the *status quo ante* as a preliminary to the resolution of the application for review and the stay of execution. Those have fallen away by reason of applicant's withdrawal of same. The eviction order has not been set aside in HC 7310/18 as argued by the applicant. It is still extant and there is nothing to bar execution of same.

Accordingly, the application for a provisional order, as prayed for is dismissed with costs.

Kadzere, Hungwe and Mandevere, 1st Respondent's Legal Practitioners