RITA MARQUE MBATHA
versus
VINCENT NCUBE
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 24 October 2022 and 25 January 2023

Urgent Court Application

Applicant in person
1st respondent in person
No appearance for 2nd respondent

MANYANGADZE J: This is an urgent court application in which the applicant seeks the following relief:

> "**TERMS OF THE FINAL ORDER SOUGHT**
>
> That the First Respondent shows cause why a final order should not be granted in the following terms:
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> 1. The Application be and is hereby granted
> 2. The Execution of the Default Judgment granted on the 21st of June; 2022 under Case No MC 39520/16 against the Applicant be and is hereby stayed pending the determination of the Application for Rescission of Default Judgment under Case No SC 237/22
> 3. There shall be no order to costs
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> **INTERIN RELIEF GRANTED**
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> Pending the return date the following relief is granted.
>
> 1. The writ of execution under Case No MC 39520/16 issued by the First Respondent authorizing the Second Respondent to Execute following the default judgment SC 237/22 be and is hereby suspended."

This is a somewhat peculiar application, in that it has been filed against the background of numerous applications, stretching from the Magistrates Court, the High Court, right up to the Supreme Court. The following facts, which are all common cause, should help place the matter into perspective.

The applicant is a tenant at a residential property owned by the first respondent, known as No 126 Edgemore Road, Park Meadowlands, Hatfield, Harare (the property). On 27 September 2017, the first respondent obtained an order from the Magistrates' Court, Harare, under Case No. 39520/16, evicting the applicant from the property. The applicant was in default. She filed an application for rescission of the default order, which application was dismissed.

The applicant went on to file an application for review in the High Court, seeking to nullify the Magistrates' Court proceedings. The application for review was filed under Case No. HC 7542/17. The applicant also filed an application for stay of execution pending the determination of the application for review, under Case No. HC 9296/17.

Whilst the above mentioned applications were pending, the applicant filed, under Case No HC 7310/18, an application for a spoliation order against the respondents. This application was granted on the following terms:

> **"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 (sic) 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 and the Hisense plasma colour television that he disposed her of on 7 August 2018.
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> **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."

The application was granted as a provisional order on 9 August 2018 and as a final order on 12 September 2018.

The applicant, erroneously believing that the order granting spoliatory relief definitively pronounced on the substantive rights of the parties over the property, withdrew the applications for review and stay of execution.

Following this development, the first respondent made a fresh bid for the eviction of the applicant. He did so on the basis that there was no longer an application for review and stay of execution pending, and thus the Magistrates' Court order of 27 September 2017 was extant and enforceable.

This move by the first respondent prompted the applicant to file, under Case No HC 5701/21, an application, for an interdict, wherein she sought to restrain the first respondent from evicting her. In a judgment handed down on 18 November 2021, MUCHAWA J dismissed this application. She found, *inter alia*, that the spoliation order only dealt with the applicant's immediate concern over peaceful possession and occupation of the property, pending the application for review. It did not set aside the eviction order granted by the Magistrate Court. In dismissing the application for an interdict, the learned judge stated, at p 9 of the cyclostyled judgment:

> "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."

Aggrieved by this decision, the applicant noted an appeal to the Supreme Court, under Case No SC 443/21. In an order handed down on 6 June 2022, in default of applicant's appearance, the Supreme Court dismissed the appeal with costs. This was followed by a full judgment, in which the Supreme Court indicated that it proceeded under r 53(3) of the Supreme Court Rules, 2018, and determined the appeal on the merits.

The Supreme Court upheld the court *a quo's* finding that the Magistrates' Court order under MC 39520/16 was extant and was not and could not be set aside by the spoliatory order under Case No HC 7310/18.

In the Supreme Court judgment, SC 109/22, GWAUNZA DCJ stated at p 10 of the cyclostyled judgment;

> "The proceedings in HC 7310/18 were merely aimed at restoring the appellant's peaceful and undisturbed possession of the property. There could be no feasible consideration of her rights or those of the first respondent as pronounced in MC 39520/16 because it was irrelevant to the disposition of the matter. The court *a quo* correctly noted that spoliation proceedings can be followed by further proceedings determining the rights of the parties to the disputed property. The remedy is aimed at ensuring that parties follow due process in asserting their rights.

> By parity of reasoning, the enforcement of an extant court order is one of the avenues through which parties uphold the rule of law. For the reasons set out above, the order in MC 39520/16 is still extant and could not be competently set aside under the spoliation proceedings in HC 7310/18. The order remains a lawful process that is enforceable in the absence of a review of its procedural propriety or an appeal that impugns its substance."

The Supreme Court went on to point out that an interdict is not a competent remedy against a valid court order. The Supreme Court stated, at p14 of the cyclostyled judgment:

> "The position of this Court regarding the interdict of lawful process is well established.
> In the case of *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (C), on page 84 para F-G, MALABA DCJ (as he then was) illuminated the following:
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> > "An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe. **An interdict cannot be granted against past invasions of a right nor there an interdict against lawful conduct.** *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004(1) ZLR 511(S): *Stauffer Chemicals* v *Monsato Company* 1988(1) SA 895; *Rudolph & Anor* v *Commissioner of Inland Revenue & Ors* 1994(3) SA 771 (W)." (my emphasis)
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> The point underscored in the above-referenced authorities, applies forcefully to the present matter. The court *a quo* could not grant the interdict as the respondents' actions were anchored on a valid court order obtained in the Magistrates Court. (See also *Magaya* v *Zimbabwe Gender Commission* SC 105/21."

The applicant went on to file, in the Supreme Court, an application for rescission of judgment. This she proceeded to do notwithstanding the indication by the Supreme Court that it had determined the matter on the merits in terms of r 53(3) of the Supreme Court Rules, 2018.

The application for rescission of judgment, filed under Case No SC 237/22, was dismissed on 12 October 2022. It is indicated in the order dismissing the application that full reasons will follow in due course. Both parties appeared in person at the hearing of the application.

From the above chronology of the route the matter has travelled, it is clear the litigation between the parties has run its full course. It started in the Magistrates' Court, went through the High Court, and ended up at the Supreme Court.

Given that background, this court was of the view that it had no jurisdiction to entertain the application for stay of execution. So fundamental was this issue that the court considered it necessary to raise it with the parties from the outset, lest it went on to deal with a matter that was not competently placed before it. In this regard, the following exchange between the court and the parties was recorded;

"COURT: Can I get a proper sequence of events- you appealed to the Supreme Court against High Court decision?
APPLICANT: Yes
COURT: The appeal was dismissed in default of your appearance?
APPLICANT: Yes
COURT: There was an application for rescission of that judgment?
APPLICANT: Yes
COURT: This application was dismissed, in the Supreme Court?
APPLICANT: Yes
RESPONDENT: That is what happened
COURT: The eviction order, in what court was it obtained?
RESPONDENT: The Magistrates' Court.
COURT: From Magistrates' Court?
RESPONDENT: There was an appeal by the applicant to the High Court. The High Court upheld the Magistrates' Court order. Applicant appealed to the Supreme Court. That is what led to the Supreme Court decision in question.
COURT: Can the parties address me on why I should be seized with this matter before going any further, in view of the path it has travelled.
APPLICANT: I believe these are case authorities which state that in a case where proceedings should be stayed the High Court is the one with jurisdiction. Despite the higher courts being seized with the matter, all matters relating to stay of execution, the High Court is the one that can deal with them. Jurisdiction of the High Court is inherent…..
Judgments cannot be carried out except with the leave of the court where an appeal has been noted…..
RESPONDENT: I do not know the rules of the High Court and everything. I do not know how far true that is
I thought if a higher court has made a ruling, that stands over the lower court's ruling."

The applicant's explanation for the course of action she has adopted is that the High Court has inherent jurisdiction to control its processes. This jurisdiction, according to the applicant, is exercised even if the matters are on appeal in the Supreme Court. For this proposition, she relies on the case of *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534. She quotes the remarks of CORBERTT JA, at pp 544-545H;

> "Whatever the true position may have been in the Dutch Court, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd* v *Estate Marks and Another* 1961 (2) SA 118(T) at pp 120-3), it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application……The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from…….The Court to which application for leave to execute has a wide general discretion to grant or refuse leave and, if leave granted, to determine the condition upon the right to execute shall be exercised."

Applicant further makes reference to the case of *Netone Cellular (Pvt) Ltd* v *56 Netone Employees & Another* SC40/05, where the same principle was underscored by the Zimbabwe Supreme Court.

Indeed, the trite position is that once an appeal is noted with the Supreme Court, execution of the judgment appealed against is automatically suspended pending the determination of the appeal. It can only be executed if the party in whose favour the judgment was granted, seeks and is granted, leave to execute by the court that granted the judgment.

Thus, in the instant case, it is the first respondent who ought to have sought leave to execute upon noting of his appeal to the Supreme Court. This is so because the noting of the appeal by the applicant would have automatically suspended execution of the High Court judgment.

However, as already indicated, the appeal is no longer pending in the Supreme Court. It was determined in favour of the first respondent. The applicant lost the appeal. Curiously, applicant seeks suspension of execution pending an application for rescission of judgment filed under SC 237/22. That application was dismissed on 12 October 2022, as already pointed out. Even if it was still pending, that process is not before this court. It relates to rescission of a judgment granted by the Supreme Court, which disposed of the applicant's appeal. There is no basis on which this court can exert control over such proceedings.

Clearly, the application for stay of execution is not property before this court. It is misplaced. The proper course of action is to order that it be struck off the roll.

The court notes that the applicant attempts, through her heads of argument, to provide a different basis for the relief she seeks. She submits that she has filed an application in the Constitutional Court, in which she seeks to be granted direct access to that court. If granted that access, she intends to challenge the Supreme Court judgment dismissing her appeal against the High Court judgment.

It is this court's considered view that that application does not provide a basis for this court to entertain the application for stay of execution. To begin with, that is not what is in the founding papers placed before the court. The papers before this court relate to an appeal before the Supreme Court, which appeal has been disposed of. This is a new relief, brought through submissions made in heads of argument. It is not contained in the application this court has been asked to deal with.

In the circumstances, the application for stay of execution is not properly before the court. It is fundamentally and fatally defective. There is no need to even go into the merits or demerits thereof. It must be struck off the roll.

In the result, it is ordered that:

1. The urgent court application for stay of execution be and is hereby struck off the roll.
2. The applicant bears the respondent's costs.