CORNELIO MUDZANI SUNDUZA

And

YVONNE SUNDUZA

Versus

TATENDA GOTOSA

And

NOKUTHULA HUTIRE

And

MESSENGER OF COURT, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 1 MARCH AND 9 MARCH 2023

Urgent Chamber Application

V. Majoko, for the applicants
J. Ndubiwa, for the 1st and 2nd respondents
No appearance for the 3rd respondent

KABASA J: This urgent chamber application was filed as an *ex-parte* application. After going through the application I directed that the application be served on the respondents. This was done and the 1st and 2nd respondents duly filed their notice of opposition.

The relief sought by the applicants is couched as follows:-

"**Terms of Final Order Sought**

1. The ejectment of the applicants from the premises at No. 30 Roger Road, Sunninghill, Bulawayo, following proceedings in the Magistrates Court between the 1st and 2nd respondents in case No. 127/22 and CG 569/22 be and

is hereby stayed pending final determination of the application for review filed by the applicants under case No. HC 26/2023 pending before this court.

2. If, at the time this order is granted the applicants have been evicted then this order will operate as an order restoring the applicants in occupation to and of No. 30 Roger Road, Sunninghill, Bulawayo.

Interim Relief Granted

1. The judgment/ruling in case No. 127/22 and CG 569/22 has no operative part from which a writ of ejectment can be issued.

2. The writ of ejectment issued in case No. 127/22 or CG 569/22 be and is hereby held to be of no force and effect and is ordered cancelled.

3. The 1st and 2nd respondents pay costs of this application on the scale as between, legal practitioner and client.

Service of Provisional Order

This application and provisional order shall be served on the respondents by the Deputy Sheriff or by applicants' Legal Practitioners in the manner prescribed in the Rules of Court."

The 1st and 2nd respondents opposed the application. The 3rd respondent has no real interest in the matter given that his role is to execute court judgments and so would not be ordinarily expected to file an opposition to the application.

It is important to give the background to this matter. It is this:-

The applicants' immovable property was attached in execution and subsequently sold at a sale conducted by the Sheriff. Nappon Investments (Pvt) Limited was declared the highest bidder. The applicants sought to stop the confirmation of the sale by the Sheriff but were unsuccessful. An attempt to have the Sheriff's decision set aside by this court met with the same fate. An appeal against this court's decision suffered a still birth as it was not prosecuted.

The 1st and 2nd respondents subsequently obtained title to the immovable property. They sued the applicants for eviction and were successful. The applicants appealed against the Magistrates Court decision ordering their eviction. The respondents sought and obtained an order allowing execution pending appeal. The applicants again noted an appeal against the decision allowing execution pending appeal. An application for review was also subsequently

filed seeking to vacate the Magistrate Court decisions on the basis that the court's orders did not "speak" as the operative part granted the applications "in terms of the draft."

The present application was then filed seeking to declare the judgments of the Magistrates Court defective for lack of an operative order and consequently declaring the writ of ejectment in the same matters to be of no force and effect and that it be ordered cancelled. The review application and the present application essentially seek the same relief.

In opposing the application the respondents took points *in limine*. These points *in limine* are dispositive of the matter in the event that they succeed. This judgment is concerned with these points *in limine*. I intend to deal with the one on urgency first as its resolution will inform the course to take as regards the other points *in limine.*

1. **IS THE MATTER URGENT?**

Counsel for the respondents contended that the matter is not urgent. This being so because as at 19th December 2022 the applicants became aware of the imminent ejectment when they were served with a notice of ejectment.

They chose to note an appeal against the interlocutory order allowing for execution pending appeal. From October 2018 they were aware the Sheriff intended to transfer the immovable property into the respondents' names, which transfer has since been effected. The applicants ought to have acted on 19th December 2022 when the notice of ejectment was served.

Mr. Majoko, counsel for the applicants countered this argument and submitted that urgency is not measured purely on the narrow inquiry as to when the need to act arose. The court must consider that which is sought to be averted and the potential prejudice should it not be averted.

The respondents have a writ whose execution is imminent. The applicants noted an appeal upon becoming aware of such writ and it matters not whether such appeal is ruled invalid by virtue of it being an appeal against an interlocutory order. The point is the applicants acted. The applicants had earlier sought audience with the Provincial Magistrate regarding some irregularities they noted in the writ of execution and eventually filed the application for review on 27th January 2023, so counsel argued.

The papers on record show that the eviction application was granted on 4th November 2022 and the leave to execute pending appeal on 14th December 2022. The writ of execution or notice of such eviction was served on the applicants on 19th December 2022. The applicants noted an appeal on 20th December 2022 and slightly over a month later filed an application for review.

The applicants' eviction was an event they were aware was bound to happen as early as November 2022 and became real on 19th December 2022 when the notice for ejectment was served on them.

They were aware of the judgments of the Magistrates Court and equally aware of what they perceived as irregularities in the couching of the operative order. They however did not seek to vacate these orders by way of review as at November 2022 and only sought to file a review application in January 2023 when eviction was literally knocking at their door.

In *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 CHATIKOBO J made the pertinent point that:-

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait."

Time is obviously of the essence. Where a litigant deems their matter urgent and the harm to be visited on them of such a nature that urgency is a necessity, their actions must also have urgency.

This point was made with clarity in *Gwarada* v *Johnson* 2009 (2) ZLR 159 where the court said:-

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat."

Was there such urgency exhibited *in casu?* I think not. The applicants would have the court drop everything and allow them to jump the queue ahead of the many other litigants awaiting their turn, because they would like to stop an eviction they were aware of as far back as 2018 when transfer of the property was to be effected. They went on a merry go round

culminating in the aborted appeal against the refusal by this court to set aside the sale. Ejectment was sought and granted and leave to execute also granted before they decided to bring the Magistrates Court decisions on review and thereafter seek to stop the inevitable by filing the present application.

In *Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240 at 244 C-D MAKARAU JP (as she then was) had this to say:-

> "… urgent applications are those where if the court fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

The narration of events *in casu* hardly justifies such a reaction on the part of the applicants.

Every litigant considers their matter as deserving of urgent resolution and if it were humanly possible, the courts would hear almost all matters on an urgent basis. The fact that the harm being sought to be averted is an eviction is not in itself reason to hold that the matter is urgent. Sight must not be lost of the background I have already outlined.

GOWORA J (as she then was) succinctly made this point in *Triple C Pigs and Anor* v *Commissioner-General* ZRA 2007 (1) ZLR 27, when she said:-

> "Naturally every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts, in order to ensure delivery of justice, would endeavor to hear matters as soon as is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement or violation of some legitimate interest and whether or not the infringements of such interest, if not addressed immediately, would not be the cause of harm to the litigant which any relief in the future would render *brutum fulmen*."

I must distinguish an issue where a litigant seeks to stop eviction on the basis that the judgment upon which the writ of eviction stands was one granted in default and an application for rescission has been made which is very likely to succeed. The eviction would therefore

cause undue hardship should it be carried out before the rescission application is determined, and the facts of this case where the issue of eviction was inevitable as far back as 2018 when the property was transferred into the respondents' names and attempts to vacate the sale of the property hit a brick wall at every turn.

The circumstances of this case do not call for this court to exercise its discretion and hear this matter on an urgent basis. The applicants are just like any other litigant seeking to vacate a decision they are unhappy with. They should, like any other litigant await their turn and follow the queue.

I am of the considered view that my pronouncement on this first point *in limine* precludes me from considering the other 2 preliminary points on *lis pendens* and incompetent relief. This is so because it will amount to a contradiction for me to say the matter is not urgent ad yet go on to consider points in limine other than the one on urgency. To do so would amount to considering the matter and resolving it on the basis of these preliminary points. This, in my view, can only be done when the matter is heard and a decision made on the merits or demerits of the other preliminary points, which the court may either uphold or dismiss. I cannot determine these other points *in limine* and possibly dispose of the matter when I have already ruled that the matter is not deserving of an urgent hearing and determination. I could only proceed to determine the other preliminary points had I ruled that the matter is urgent.

I intend to make an order for costs but as a case for punitive costs has not been made, I do not intend to award such on a punitive scale.

Given the finding that the matter is not urgent, I make the following order:-

1. The application be and is hereby struck off the roll of urgent matters.

2. The applicants shall pay costs of suit at the ordinary scale.

Messrs. Majoko & Majoko, applicants' legal practitioners
Mashayamombe & Co Attorneys, 1st and 2nd respondents' legal practitioners