HENRY SHONAI TODZANISO

Versus

HELEN LADAS

And

KNIGHT FRANK

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 3 AND 23 JUNE 2011

S Chamunorwa for the applicant
N. Ndlovu for the 1st and 2nd respondents

Urgent Chamber Application

NDOU J: The applicant seeks a temporary interdict to stop the execution of a judgment granted against him in favour of the 1st and 2nd respondents granted in case number HC 2301/10. Alternatively, if the order has already been executed, his reinstatement into the premises subject matter of these proceedings being shop number 5, 105 George Silundika Street, Bulawayo. The facts of this matter are the following. The applicant was a tenant of the 1st respondent at the abovementioned premises. At the stage where he owed the 1st respondent arrear rentals the sum of US$8 000, the latter issued summons under HC 2301/10 to recover the same. In the fullness of time, the 1st defendant applied for and obtained default judgment on 24 February 2011. In April 2011 the Deputy Sheriff served a writ of execution upon the applicant and applicant approached the 1st and 2nd respondents' legal practitioners with an objective of having an amicable settlement. The applicant made certain specific representations regarding how he proposed to settle the matter to avoid execution of the above-mentioned judgment of this court. He made an undertaking to pay off the judgment debt from the proceeds of the sale of his house. He explained to the said legal practitioners that the conveyancing lawyers, Messrs Webb, Low and Barry were holding the purchase price in trust pending the transfer of title. 1st and 2nd respondents' legal practitioners asked the applicant to put the undertaking in writing, which the applicant did. The letter of undertaking

only covered monetary aspect of the court order under HC 2310/10. It did not cover the eviction and hence the Deputy Sheriff was never instructed to stay the eviction process. The applicant says the acceptance of his payment plan constituted a compromise of the order under HC 2301/10. This is hotly disputed by the 1st and 2nd respondents. At the time this application was launched, the applicant had been evicted from the premises although some of his property remained in the premises. What is clear is that the above-mentioned writs were not withdrawn by the 1st and 2nd respondents.

The first issue I propose to deal with is whether there was a compromise. The definition of compromise will resolve this issue. Compromise or *transactio*, is the settlement by agreement of disputed obligations, whether contractual or otherwise. The obligations novated here must previously have been disputed or uncertain - *The Law of Contract in South Africa* – R H Christie at 448-9. *In casu*, there are no disputed or uncertain obligations. The applicant did not defend the matter under HC 2301/10 so there is no dispute of obligations. Even in his papers he does not dispute that he owes arrear rentals of US$8 000. Because applicant is alleging compromise he bears the onus of proving the existence of compromise – *The Torch Marderne Binnehuis Vervaardiging Venn (Edms) Bpk* vs *Husserl* 1946 CPD 548. He has not discharged this onus. Because this application was for stay of execution pending applicant's declaration of compromise, once he fails to establish the compromise, it should fall away because he has failed to establish a right or a prima facie right.

More importantly though is the fact that when I heard the application the applicant had been fully evicted from the premises. All that he seeks in effect is his reinstatement into the premises. But can reinstatement be granted via an interdict? *In casu,* the applicant seeks to delay the enforcement of a legal right to which the court has found the 1st respondent entitled. There is no statutory authorization of such delay. The applicant does not even challenge the existence of such a right as he does not at all challenge the finding of the court on the existence of such right made under case number HC 2301/10. This court has no competence to do so in such circumstances – *Potgieter* v *Van der Merwe* 1949 (1) SA 361 (A) at 374 and *Lovius and* Shtein v *Sussman* 1947 (2) SA 241 (O) at 243-4. On this point alone this application should fail.

However, there is a further problem in the applicant's case. As alluded to above when the application was filed, the applicant had already been evicted. Part of his property still remained in the 1st respondent's premises though when I heard the application even the latter property had been removed. Basically what is sought is restoration of occupation. It is trite law that an interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes an application for interim relief – *Meyer* v *Meyer* 1948 (1) SA 484 (T);

Stauffer Chemicals v Monsanto Co 1988 (1) SA 805 (T) at 809F-G and *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517E-H.

From the foregoing there is, therefore, no merit in the application. It is accordingly dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Cheda & Partners, 1st and 2nd respondent's legal practitioners