

SHAILLON CHISWA
versus
MAXESS MARKETING (PVT) LTD
and
JOHN KAINGA
and
SUSAN MUSAKWA
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 22 January 2020, 26 January 2020 & 5 February 2020

Urgent chamber application

O.T. Sanyika, for the applicant
T. Zhuwarara, for the 1st-3rd respondents

KWENDA J: The applicant seeks an order of this court interdicting first, second and third respondents from evicting her arbitrarily from stand 627 Helensvale township, of subdivision 33, Helensvale, Harare (hereinafter referred to as ‘the property’) or in the event of eviction having taken place before this matter is heard, an order restoring possession to her. The fourth respondent has no interest in the outcome of this matter and will abide by the court’s decision. Accordingly, reference to respondents shall be to first, second and third respondents only. Applicant seeks a provisional order pending the outcome of other matters which are already before the courts. (**see grounds of application**).

The interim relief sought by applicant is to the following effect:

1. that respondents’ be interdicted from arbitrarily evicting, locking out or doing anything that may interfere with applicants’ peaceful possession of stand 627 Helensvale township, of subdivision 33, Helensvale, Harare.
2. that respondents be ordered to restore possession of the said property to the applicant if an arbitrary eviction has taken place.

3. that respondents be ordered to vacate the property in the event that they take possession before matter is heard.
4. that the sheriff be authorised to restore possession to the applicant should respondents fail, neglect or refuse to do so.

The draft final order is similar to clause 1 of the interim order with an additional prayer for costs on a legal practitioner client scale.

Preliminary objection

Advocate *Zhuwarara* raised a preliminary objection. He argued that this application is based on a past wrong. I understood him to submit that the alleged violation is complete because the applicant has already been evicted from the property. He argued that where a harm has terminated, the aggrieved party must sue for damages as opposed to applying for an interdict. He cited *Meyer Logistics v ZIMRA SC 7/2014* and *Stanfer Chemicals v Mansalio 1988 (1) SA 805* as authorities for the submission that the purpose of an interdict is to prevent harm and where the harm has already visited the applicant, an interdict is not the correct remedy. He submitted that it is an essential requirement of an interdict or urgent relief is the absence of an alternative remedy. He argued that the alternative remedy of damages is available in this case. He submitted that it would have been a different matter had the applicant applied for a spoliation order.

In response, applicant's counsel argued that this application was made in anticipation of harm. She submitted that although the word spoliation does not appear, the conduct complained of amounts to spoliation. She submitted that the mischief complained of is ongoing. The respondents have denied her access to her home and continue to do so. She submitted that Adv *Zhuwarara's* submission that the applicant has already been evicted is not correct because applicant's property is in the house. The threats of violence have not been withdrawn. On 18 January 2020, the second respondent wrote an email to the applicant declaring his decision to take matters into his hands. She submitted that there is, therefore, a legal basis for the court to intervene on an urgent basis to prevent further harm befalling the applicant. She conceded that the criticism levelled at the draft provisional order but argued the remedy sought by the applicant is clear from the founding affidavit. She submitted that the court has the power to amend the draft provisional order.

In reply Mr *Zhuwarara* emphasized the point that the final order is fatally defective because it does not make reference to the pending matters at all. He argued that an interim relief is not merited when the final order to be sought on the return day is fatally deficient or defective.

I dismissed the preliminary objection and based my ruling on the following facts:

1. It is common cause that in December 2018, the respondents gave applicant vacant possession of the property in terms of an agreement of sale executed among them in October 2018. The applicant has enjoyed peaceful and undisturbed possession.
2. The dispute of the parties was triggered by applicant's failure to complete payments for the property within the agreed time frame. As a way of purging her default, the applicant has tendered the balance of the purchase price while at the same time demanding transfer.
3. Meanwhile the respondents have instituted eviction proceedings in the Magistrates' court. Despite that the eviction proceedings are still pending, second respondent has declared that nothing will stop him from physically removing the applicant from the property
4. The respondents have locked the applicant out of her home and have, through threats of violence, prevented the applicant from entering the house. According to the applicant, the unlawful conduct has persisted. Correctly construed the conduct complained of constitutes interference with applicant's peaceful possession of the property. While agreeing with Advocate *Zhuwarara*'s exposition of the law, I rejected his submission that the violation complained of, is a past event.
5. The applicant has alleged that the respondents have denied her access to her home and continue to do so. Indeed, they continue to deny her access as long as their locks remain in place and they have not withdrawn their threats of violence.
6. There are indeed cases pending before this court and the magistrate's court which are expected to resolve the parties' dispute which must be resolved by due process
7. The interim order is not defective because paras 1 and 2 thereof speak to an order restraining the respondents from unlawfully interfering with applicant's peaceful and undisturbed possession of the property.

8. This court has the power to amend a draft provisional order where it does not properly capture the appropriate remedy merited and articulated in the founding affidavit. (**see rule 240 Of the High Court rules, 1971**)

240. Granting of Order

“(1) At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.

[Sub rule amended by s.i. 25 of 1993 and s.i. 33 of 1996]

(2) Where the court grants a provisional order under sub rule (1), rule 247 shall apply, *mutatis mutandis*, to the provisional order as though it were granted following a chamber application.”

I proceeded to hear the matter on the merits.

On the Merits

I consider the following to be common cause

1. In October 2018 the applicant purchased stand 627 Helensvale Township of subdivision 33 Helensvale from the first respondent represented by second and third respondents.
2. The applicant took vacant possession in December 2018 in terms of a clause to the agreement after paying 50% of the purchase price.
3. A dispute arose when the applicant allegedly breached the agreement by failing to pay the full purchase price within the agreed time frames.
4. On 15 November the applicant issued summons under HC 9336/19 against the first defendant in which she seeks
 - 4.1 Confirmation of the agreement of sale.
 - 4.2 Transfer of the property to her while tendering the balance of the purchase price.The Sheriff attempted unsuccessfully to serve the summons and another service will be attempted.
5. Subsequently, on 3 December 2019 the applicant filed a High Court application under HC 9851/19 for a caveat on the immovable property to prevent transfer. The application is opposed and is still pending. I perused the file.
6. In a separate urgent chamber application filed under case No. HC 394/20, almost simultaneously with the present and heard by me, the applicant successfully sought an order interdicting respondents from disposing of, alienating, selling, exchanging or

encumbering the property or advertising it for sale. Mr *Muserere* who represented the respondents submitted that the parties had agreed to resolve all their disputes amicably. I entered a final order by consent restraining respondents from disposing, encumbering or doing anything for the purpose of alienating or disposing of the property pending the outcome of case No. HC 9336/19 pursuant to that submission. HC 9336/19 will resolve the parties' dispute with finality. The parties agreed that I should also hear this case against the background that I heard case no HC 394/20 rather than expecting another judge to go through the various files that I am already familiar with. I must add that it is against the background of the spirit of the settlement in HC 394/20 that I found the opposition to this application surprising. The consent order in HC 394/represented a consensus among all parties that the *status quo* should be preserved until the substantive dispute is resolved by the outcome of case No. HC 9336/19. Clearly that spirit is not reconcilable with attempts by respondents to take possession and control of the property before the real dispute is resolved.

Disposition

I have already alluded to rule 240 of the High Court of Zimbabwe rules, 1971 which empowers the court to grant any order it deems fit in any application, including a provisional order, whether or not other relief has been asked for. My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal. Indeed, there are instances when the draft order (provisional or final) may be so wrong that the court cannot correct it without stepping into the shoes of a litigant (applicant). In this case, however, the grounds of application on Form 29B allude to protection from both arbitrary conduct and interference with peaceful possession pending the outcome of the matters which are already before the court. The cases are named in applicant's founding affidavit by case numbers. They are MC 11594/19 (eviction proceedings in the Magistrates' court), HC 9336/19 (in the High court for specific performance) and HC 9581/19 (in the High court for a caveat) (see **paragraph 12, 13 & 14 of the founding affidavit**). The applicant would like the *status quo* to be preserved until case no. HC 9336/19 is finalised.

It is important, when drafting an application leaning on other matters already before the court for counsel to refer to those cases in the heading, as reference cases. That as not done in this case prompting Advocate *Zhuwarara* to argue that the final order sought suffers from a fatal deficiency and there is no legal basis for the court to mend it. I reject the argument. The case of *Kuvarega v Registrar General & Anor* 1988 (1) ZLR 188 (H) was decided with reference to the wording of draft final order which it concluded was similar to the interim relief. It means that the court applied its mind to the terms of the draft final order. In any event the whole provisional order is an order of the court. It consists of both the interim and the draft final order. (see rule 247). I must apply my mind to the interim relief sought and the conceptualisation of the underlying dispute to be dealt with on the return day. I must be satisfied that the underlying dispute is deserving of the attention of the court on the return day as can be discerned from the founding affidavit. It is like approving an issue to be referred to trial at pre-trial conference. Where the court finds that underlying dispute comes out clearly in the applicant's papers but due to poor drafting, it has not been properly presented in the draft order, the court can in its discretion, amend the draft order. In this matter, however, the applicant's counsel applied to amend paragraph 1 of the draft final order to read as follows: -

“Pending the determination of case nos. MC 11594/19, HC 9851/19 & HC 9336/19, the respondents be interdicted from arbitrarily evicting the applicant from stand 627 Helensvale township, of subdivision 33, Helensvale, Harare or disturbing applicant's peaceful possession thereof.”

Advocate *Zhuwarara* opposed the application on the grounds that the amendment sought has no relationship with the founding affidavit. I am not persuaded by that argument. I have already demonstrated how the founding affidavit speaks to the amendment sought. I will therefore grant the applicant leave to amend the provisional order, as I hereby do.

In the result I grant the provisional order as amended.

Matsika Legal Practice, applicant's legal practitioners
Chikwari and Partners, 1st-3rd respondent's legal practitioners