

BARBRA MUNAVA N.O.
and
WOODLANE FAMILY TRUST
versus
FRANCIS ROLAND HAISAID

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 8 January 2020 and 15 January 2020

Urgent chamber application

N. Munetsi, for the applicant
G. Maseko, for the respondent

DUBE-BANDA J: The applicants lodged an urgent application seeking the following relief: - It is ordered that:

1. A spoliation order against the respondent and all those claiming occupation and / or possession through him, restoring the applicants of peaceful and undisturbed possession of premises called remainder of Lot 3 of Lot 56A Borrowdale Estate otherwise known as 17 Woodlane Road, Borrowdale, Harare.
2. Costs of suit on a legal practitioner and client scale.

The certificate of urgency covers three pages and contain thirteen paragraphs. In the main what comes out from this certificate is the allegation that on the 30 December 2019 applicants were in peaceful and undisturbed possession of the remainder of Lot 3 of Lot 56A Borrowdale Estate otherwise known as 17 Woodlane Road, Borrowdale, Harare (property). It is further contended that on the 1st January 2020 respondent took occupation of the property without applicants consent. It is alleged that respondent used extra-legal self-help remedies to unlawfully take over possession of the property.

The application is opposed.

The background facts as presented by the parties are that applicants obtained a summary judgment in the Magistrate's Court requiring respondent and all those claiming occupation through him to be evicted from the property and the payment of holding over damages. A writ of ejectment was issued and in pursuance thereof eviction of the respondent from the property

was carried out on the 30 December 2019. The keys to the property were handed over to applicants' legal practitioners. It is applicants' case that respondent unlawfully re-occupied the property on the 1 January 2020. It is this alleged re-occupation of the property by the respondent that is the subject of these proceedings.

The papers before me and the submissions of the parties show that after his ejection from the property, respondent filed an *ex parte* application in the Magistrate's Court and obtained in *rule nisi* (interim order), worded as follows:- It is ordered that:

1. A *rule nisi* be issued returned to this Honourable Court sitting at Harare on theday of.....calling upon the Respondents to show cause if any why:
 - a) an order for stay of execution should not be granted in favour of the applicants under MC1798/19 pending an application for reinstatement of an appeal under HC
 - b) the Applicant should be evicted from No17 Wooldlane, Borrowdale, Harare.
2. The *rule nisi* shall act as a temporary order to stay execution and that the Messenger of Court should desist from executing the order for eviction and removal of the Applicants goods from No.17 Woodlane Borrowdale. Harare.
3. That if the execution had already taken place in the matter mentioned under paragraph 1 or 2 or both, the Respondents or their assigns be and are hereby ordered to jointly or severally restore the said property whether movable or immovable to the possession of the Applicant or his agent upon the granting of this order.
4. The messenger of Court or the Applicants legal practitioners be and are hereby directed to serve a copy of this order on the Respondents or their legal practitioners.

Applicants' case is that the validity of the *rule nisi* granted by the Magistrate's Court is not in issue. It is alleged that the cause of action is anchored on the manner in which respondent took the law into his hands and unlawfully re-occupied the property on the 1st January 2020. It is argued that the respondent did not seek the services of the Messenger of Court to give him vacate possession of the property in terms of the *rule nisi*. It is argued that it is only the Messenger of Court who could lawfully hand over the property to the respondent. Applicant relies on this proposition in terms of s 23(2) of the Magistrate Court Act [Chapter 7:10] which says "Any process issued out of any court may be served or executed through the messenger of the court out of which process is issued or through any other messenger." Applicants further relies on Order 26(1) of the Magistrate's Court Rules, 2019 which provides that the process for the execution of any judgment for ejection shall be by warrant issued and signed by the clerk of the court and addressed to the messenger.

Cut to the bone, applicants' case is that the spoliation alleged in the founding papers is founded on the fact that respondent armed with the interim order, did not instruct the messenger to give him vacant possession of the property. It is alleged that he re-occupied the property without flowing the provisions of the law.

Respondent's case is that applicants had notice of the *ex parte* application and the *rule nisi* on the 31st December 2019. In *paragraph 7* of the opposing affidavit respondent says the "applicants' legal practitioner *Nyasha Munetsi* was aware of this judgment of the 31st December 2019 and I personally handed to him a copy of the judgment on the said date, and the *ex parte* application was served on the 6 January 2010." This contention is corroborated by applicants' version, the deponent to the founding affidavit says at *paragraph 29* that "I am advised by my legal practitioners of record that the respondent advised him that they obtained a *rule nisi* in the Magistrates Court on an *ex parte* basis which *ex parte* and order are yet to be served on the applicants." Further in *paragraph 30* of the same founding affidavit she makes the point that her legal practitioners requested respondent to formally instruct the Messenger of Court to serve in terms of section 23 of the Magistrates Court Act in order that *we* become aware of the contents of the order. This put to rest the factual dispute whether applicants' legal practitioners *were* aware of the *rule nisi* on the 31st December 2019. They indeed were aware of it the 31st December 2019.

Respondent raised a number of preliminary points, the main being that this court must decline to exercise jurisdiction in this matter on the grounds that applicants have not exhausted the internal remedies provided for in the Magistrates Court Act, in that respondent obtained a *rule nisi* through an *ex parte* application which is still pending before the Magistrates Court. The return date is the 14 January 2020.

I deal with this point in turn.

Respondent's case is that this court must decline to exercise jurisdiction to hear and determine this matter on the grounds that this application is premature as the applicants have a duty to exhaust an internal remedy before approaching this court to seek a spoliation order. Although this is a principle developed and refined in the area of administrative law, my view is that it is applicable to all facets of civil litigation. The duty to exhaust internal remedies is recognised in this jurisdiction. See *Z.T. Songore v The Commissioner of taxes* S.C. 42/85. Therefore, an internal remedy must be exhausted prior to approaching this court, unless the applicants can show exceptional circumstances to exempt them from this requirement.

What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the application in issue. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success and is adequate if it is capable of redressing the complaint. See *Basson v Hugo & others* (968/16) [2017] ZASCA 192.

The Magistrates Court granted an application for the eviction of the respondent from the property. Respondent, through an *ex parte* application in the same Magistrates Court obtained a *rule nisi* staying execution and ordering the Messenger of Court to desist from executing the order for eviction and removal of the respondent from the property. Further the *rule nisi* provides that if the execution had already taken place the respondent must be restored to the property. The *rule nisi* is returnable on the 14 January 2020.

The order sought in this application, if granted gives applicants possession of the property subject to litigation between the parties. The *ex parte* application granted by the Magistrates' Court on the 31st December 2019 gives possession of the same property to the respondent, *albeit* on an interim basis. The interim order is extant. It is an order of a court of law of competent jurisdiction. If the order sought in this court by applicants is granted, this will result in two court orders, one from the Magistrates Court and the second from this court, giving possession of the same property to two opposing litigants. The court orders will be inconsistent and contradictory. Such a result is unattainable.

The issue is whether the internal remedy is effective, available and adequate. If aggrieved by the *rule nisi*, applicants has procedural options available to them. First, the interim order is temporary and provisional, its purpose is to preserve the *status quo* pending the return day. The *rule nisi* is returnable on the 14 January 2020. Applicants may move the court for the discharge of the interim order on the return day. Second, a person against whom an order is granted *ex parte* may anticipate the return day in terms of Order 22 rule 4 of the Magistrates Court Rules, 2019 which provides that any person affected by an order made *ex parte* may apply to discharge it with costs on not less than twenty-four hours' notice. If on the return date or anticipated return date applicants succeed, they will get the possession of the property which is subject of this application. They would have achieved what they seek to achieve by this application. Therefore, my answer to the issue is that the internal remedy available to the applicants is effective in that it offers prospect of success and it is adequate in that it is capable of redressing their complaint.

This application, made while the above options have not been exhausted, is irregular and amounts to an abuse of the process of this court. The Magistrates Court is seized with the matter, this court cannot, unless in special circumstances intervene and disrupt that lawful process. Applicants contend that this application was filed with this court because the Magistrates Court does not have jurisdiction on the grounds that the monetary value of the property by far exceeds the jurisdiction of the that court. It may well be so argued before that court on the return day or anticipated return day, not in this court, as a court of first instance. In the event the *rule nisi* is discharged, applicants will achieve the same result as the one sought in this court, to get possession of the property.

This a court of inherent or original jurisdiction, this means, apart from constitutional matters, it has jurisdiction in respect of all types of matters which have not been assigned to another court by legislation. Put differently, this court can do anything that the law does not forbid. However it may decline in the interests of justice, to exercise its jurisdiction in favour of a litigant. In *casu* applicants have not shown exceptional circumstances to exempt them from this requirement of exhausting internal remedies. As a result this court declines to exercise its jurisdiction over this case. This signals the end of this matter, because where a court has declined jurisdiction there cannot be proceedings before it thereafter. See *Doctor Daniel Shumba and Advocate Bruce Justin Chiota v Zimbabwe Electoral Commission and Mr Mushangwe SC 11/08*.

There is no reason why the costs of the applications should not follow the result. The respondent has asked for attorney and client costs. These are special costs and are awarded in special circumstances such as where the court wishes to express its displeasure at the reprehensible conduct of a party. An example of such a situation would be where the application is frivolous, vexatious and amounts to an unacceptable abuse of the procedures of the court. See *Mfundo Mlilo v Minister of Finance and Economic Development HH 605-19*. This application qualifies as abuse of the process of the court, I say so because applicant's legal practitioner, Mr *Munetsi* as early as on the 31st December 2019 had notice of the *rule nisi* granted by the Magistrates Court, but proceeded to file this application nonetheless. It is not disputed that applicants' legal practitioners were served with the *ex parte* application on the 6 January 2020 before filing this application on the same date. This application should not have been filed. Respondent should not be put out of pocket by the vexatious conduct of the applicants. I agree that this is a case which merits costs on an attorney client scale.

Disposition

In conclusion, this court declines jurisdiction to hear and entertain this matter on the grounds that the Magistrates Court is seized with an unterminated *ex parte* application between the same parties. Applicants have not shown special circumstances to exempt them from the requirement to exhaust internal remedies. Again there is no lawful reason given for this court to intervene at this stage and disrupt the lawful process pending before the Magistrates Court.

As a result I order as follows:

This application is struck off the roll with costs of suit on an attorney and client scale.

Tendai Biti Law, applicants' legal practitioners

Maseko Law Chamber, respondent's legal practitioners