

DISTRIBUTABLE (39)

(1) NGWARU MASANZA (*Informa pauperis*) (2) PRISCILLA
ZUNGUZA (*Informa pauperis*)

v

(1) LUKE RWAFWA (2) PLACXEDAS RWAFWA
(3) MESSENGER OF COURT

**SUPREME COURT OF ZIMBABWE
HARARE, 6 APRIL 2022**

Mr *T. Biti*, for the applicants

Ms *V. Vhera*, for the respondents

URGENT CHAMBER APPLICATION

CHIWESHE JA: In this urgent chamber application the applicants seek a provisional order couched as follows:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

- (1) That a stay of execution of the order given in CHN 286/19 be granted pending application in the High Court for condonation for late filing of leave to appeal.
- (2) In the event that this matter is opposed, that the Respondents be and are hereby ordered to pay costs.

INTERIM RELIEF GRANTED

Pending finalisation of this matter an interim order is hereby granted in the following terms:

IT IS ORDERED THAT:

1. This application succeeds and a stay of execution of the judgment in the Chinhoyi Magistrates' Court under case number CHN 286/19 be and is hereby granted to the applicants pending application in the High Court for condonation for late filing of leave to appeal to the Supreme Court."

FACTUAL BACKGROUND

In early 2000, at the height of the land reform programme, the applicants and many others moved to occupy Heydon Farm on the outskirts of Harare. They proceeded to build family homes and to engage in agricultural activities. Subsequently the whole of Heydon Farm was compulsorily acquired by the State and a notice to that effect was published in the Government Gazette in terms of the Land Acquisition Act [*Chapter 20:10*]. Contrary to their expectations none of the occupiers were favoured with either offer letters, permits or lease agreements which documents would have regularised their stay at Heydon Farm. Instead part of the farm was subdivided into residential stands with title deeds and sold to various persons. This formalised part of the farm is referred to as Heydon Township. The respondents who are husband and wife bought one of these residential stands described as stand 2915 Haydon Township, measuring 2193 square metres and received title. It is common cause that at the time of sale and transfer the applicants were resident at what became the respondents' residential stand. It is also common cause that the applicants have no legal basis to occupy Heydon Farm in general or the respondents' stand in particular.

In order to assert their proprietary rights, the respondents approached the Magistrates' Court at Chinhoyi seeking an eviction order against the applicants. Their application succeeded and an order for the eviction of the applicants from Stand 2915 Haydon Township was granted under case number CHN 286/19. Aggrieved with that outcome the applicants noted an appeal with the High Court (the court *a quo*). The court *a quo* dismissed

the appeal and confirmed the eviction order granted by the Magistrates' Court. The respondents then noted an appeal with this Court under case number SC 277/20 which appeal suspended the order of the court *a quo*. Undeterred, the respondents filed an application for leave to execute pending appeal. The application was granted by CHITAPI J under case number HC 3097/20. The applicants noted an appeal against that judgment under case number SC 441/20. The appeal was struck off the roll on the grounds that leave to appeal ought to have been sought in the court *a quo*.

In the meantime, pursuant to the order by CHITAPI J, the applicants were served with a notice of attachment and eviction from the respondents' stand. The notice is dated 28 February 2022. It is that notice that has triggered the present urgent chamber application wherein stay of execution is sought. The application is opposed.

The respondents have raised two preliminary issues, namely that the matter is not urgent and that the application has since been overtaken by events on the ground. It is argued that the urgency is self-created as the applicants failed to act when the need to act arose on 15 February 2022 when the applicants' appeal under case number SC 441/20 was struck off the roll. The applicants should have known that as a result the respondents would, in the absence of a pending appeal, proceed with eviction. Instead of acting there and then the applicants waited till they were served with the notice of attachment and eviction dated 28 February 2022, thirteen days after SC 441/20 was struck off. I am of the view that the criticism levelled against the applicants in this regard is not warranted. A delay of thirteen days cannot, in the circumstances of this case, be regarded as inordinate. The applicants had been to this Court on appeal. They were not sitting on their laurels. The appeal was not dismissed but struck off the roll on a technicality. They are attending at the High Court seeking leave to appeal.

Whilst awaiting the results they were served with the notice of eviction. They have reacted swiftly to that notice by filing the present application. I would for those reasons dismiss the preliminary issue and hold that the matter be treated as urgent.

However, the second preliminary issue has merit and is dispositive of the application. The respondents contended that the applicants have been evicted from their stand in terms of an extant eviction order. Mr *Biti*, for the applicants, has not denied that his clients have been evicted. Instead he sought to argue that the eviction was not effectively carried out as the Messenger of Court only threw out the applicants' property but left the dwelling shack intact. The implication being that the applicants, having been evicted returned to occupy the shack. It would be remiss of this Court to run along with Mr *Biti's* suggestion and reverse an eviction properly executed in terms of a court order on the grounds that the Messenger of Court ought to have destroyed the dwelling shack. What was to be evicted are the applicants and not their shack. I hold therefore that the eviction was effected and that the applicants' return to the stand is in direct disregard of a lawfully given court order. This Court cannot condone their contemptuous conduct.

I agree with the respondents that in view of the applicants' eviction this application has been overtaken by events and has thus been rendered moot. It cannot succeed.

As the applicants are indigent there shall be no order as to costs.

It is ordered as follows:

“The application be and is hereby dismissed with no order as to costs.”