LESLIE KHUMALO

Versus

VISION SITHOLE

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 FEBRUARY 2011 AND 17 FEBRUARY 2011

V. Ruwombwa, for the applicant
Respondent in person

JUDGMENT

MATHONSI J: The applicant is the beneficiary of an eviction order of this court issued on 1 June 2009 in terms of which the Respondent is to be evicted from a garage known as G6 Montrose Mansions, in Bulawayo.

It would appear that immediately after that eviction order was issued, the Respondent submitted an application for rescission of the order which, for some unclear reasons, has not been prosecuted 1 year 7 months later. Instead the Respondent has occupied himself with filing a number of other extraneous applications which have not taken the matter anywhere.

One such application was made under case No. 872/09 in which he sought an order interdicting the Applicant from evicting him from the garage in question. It was heard by my brother Kamocha J as an opposed matter and on 8 July 2010 he handed down judgment dismissing the application with costs on an attorney and client scale.

The Respondent immediately noted an appeal against the judgement of Kamocha J in the Supreme Court on 13 July 2010 under case No. SC 168/2010. The grounds upon which the Respondent relies in that matter are as follows:

> ''GROUNDS OF APPEAL
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> 1. The court *a quo* erred in dismissing the application in that id (sic) did not consider the magnitude of the consequences of the order in Case No. HC 293/2009 to give me a chance to be heard. I have always insisted that this matter should be put to trial considering that all applications before the court are chamber applications. To add injury to the wound the Respondents matter was improperly before the court in his matter HC 2509/2008 considering that I had issued summons HC 1264/2008.

2. The judge did not give due weight to the fact that this matter has never been put to trial of which it should, because there are serious allegations of fraud and forgery on the documents put before the court.

3. The judge failed to appreciate that I am in possession of an affidavit deposed by the person who bought the particular garage from 1st Respondent and later sold it to me regardless of the fact that the Notarial Deed had not been changed.

4. The judge did not take into consideration that the purchaser of the garage from the 1st Respondent is prepared to come to court and be my witness at trial of which I believe in the interest of justice that should be allowed to happen. On that reason alone this matter should be put to trial.

5. The judge failed to taken (sic) cognisance of the fact that this matter has never been considered on its merits but technicalities which I am not privy to, but what I am certain of is that I have been robbed of my garage, and my rights to justice simply because I happened to be a self actor but self actors are provided for by the law. This matter was concluded before a trial consequently there is every reason to put this matter for trial.''

It is not difficult to follow how the learned judge arrived at the conclusion that he did. The dispute between the parties involves ownership of a garage situated at stand 13921 Bulawayo Township, also known as Montrose Mansions. Each of the parties owns a Flat at the place which they hold by sectional title with applicant owning share number 14 and Respondent owning share number 17.

The respective shares of the parties at the block of Flats are defined in the Notorial Deed No. 213/89 registered at the Deeds office in Bulawayo. That of the Applicant being share number 14 is described in the Notorial Deed as:

''14. two bedroomed flat with private balcony on the first floor designated as Flat 14 and a garage designated as G6 on the plan annexed and known as Flat 8 Montrose Mansions 6.17%.''

That of the Respondent is defined as:

''17. one bedroomed flat situate above a section of the garages designated as Flat 17 on the plan annexed and known as Flat 7 Napier House 4,23%.''

Clearly therefore the ownership documents as registered at the Deeds office reflect that applicant is the rightful owner of the garage known as G6 Montrose Mansions. Realising that he could not rely on the documentation to claim the garage, the Respondent turned round to allege that the said garage had been sold by the applicant to someone else, one Nkosana

Ncube, who in turn sold it to Respondent. Unfortunately the sale agreement between himself and the said Nkosana Ncube which he relies upon says nothing about the sale of the garage.

Displaying a ''never say die'' attitude, Respondent was not to give up easily, he then elicited a photocopy of an affidavit purportedly deposed by one Nkosana Ncube in the United Kingdom, alleging that he purchased the garage from the applicant and later sold it to the Respondent. That document has its own evidentiary shortcomings but more importantly it cannot override registered title as contained at the Deeds office.

Faced with this kind of evidence Kamocha J had no difficulty concluding that the garage belonged to the applicant and dismissed the Respondent's application, prompting the Respondent to note the appeal aforesaid.

The applicant has now approached the court seeking an order authorising execution pending appeal on the basis that the appeal is devoid of merit and has been undertaken for purposes of delaying the inevitable. I must state that for some time now the Respondent has tenaciously pursued applications in this court demanding the recusal of my brother judges who have dealt with this matter namely Cheda and Kamocha JJ. When this matter was set down for argument before Kamocha J on 26 January 2011 he filed a chamber application (HC 129/2011) in which he made serious allegations against both the learned Judge and the Assistant Registrar and sought an order that the matter be transferred to Harare as he was no longer ''comfortable'' with the matter being dealt with in Bulawayo.

While he could not be allowed to have the matter transferred to Harare, he succeded in having Kamocha J recuse himself resulting in the matter being placed before me. Even then, when the matter was set down before me for 14 February 2011, the Respondent submitted a letter dated 10 February 2011 arguing that as he had noted a further appeal against the order of Kamocha J dated 26 January 2011, he expected the hearing of the matter to be stayed until the finalisation of his latest Supreme Court appeal.

It is useful to note the latest order that he purported to appeal against. It reads:

''The matter be and is hereby postponed *sine die* for it to be placed before another judge.''

Just what was there to appeal against in that order is not easy to fathom, so is the issue of how the Respondent felt he could commandeer the entire justice system to his whims and caprices as to allow him to have a matter transferred to Harare because he is ''no longer comfortable'' to have his matter under the Assistant Registrar of this court, poses a serious challenge to the mind. There can be no worse abuse of process.

In an application for leave to execute pending appeal the law is set out in *van t' Hoff* v van t' Hoff (2) 1988(1) ZLR335 at 337G and 338 A-B where Adam J stated:

> ''The law is clear from the authorities cited to me, more particularly *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534(A) at p545 where Corbett JA observed:
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> 'The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. In exercising this discretion the court should in my view, determine what is best and equitable in all the circumstances and in doing so would normally have regard *inter alia*, to the following factors;
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> 1. The potential of irreparable harm or prejudice sustained by the appellant on appeal (the respondent in the application), if leave to execute were to be granted;
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> 2. The potential of irreparable harm or prejudice being sustained by the respondent (applicant in the application) if leave to execute were to be refused.
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> 3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose to gain time or to harass the other party;
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> 4. Where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience, as the case maybe.' ''

I have considered the judgment of my brother Kamocha J which the Respondent has appealed against and I am impressed by the clarity of reasoning and the analysis of the evidence before him. He weighed both sides of the dispute with careful precision and rejected the Respondent's case in favour of that of the Applicant. His conclusion is beyond reproach. I have also considered the Respondent's grounds of appeal. I have no hesitation whatsoever in concluding that the appeal is lamentably without merit and indeed borders on the frivolous and vexatious. It simply has no prospects of success.

I am also mindful of the conduct of the Respondent who has stopped at nothing to frustrate the hearing of this matter. In my view the appeal has been noted to buy time and also to harass the applicant. This cannot be allowed and I intend to exercise my discretion in favour of the applicant as he has discharged the onus placed upon him to show a proper case for the grant of leave to execute pending appeal. It is the conduct of the Respondent which I find

thoroughly reprehensible. The applications and reverse applications which he has been making including the latest appeal against absolutely ''nothing'', so to speak, constitute an abuse of process of the highest order. This is a litigant who thinks he can play games with the court and get away with it. That behaviour has to be visited with punitive costs.

In the result I make the following order; that

1. The applicant be and is hereby granted leave to execute the judgment in case No. HC 872/09 by the eviction of the Respondent and all those claiming through him from garage number G6 Montrose Mansions Bulawayo situate on stand 13921 Bulawayo Township Bulawayo pending appeal made by the Respondent.

2. This order shall not be suspended by any further appeal or application as may be made by any party hereto.

3. The Respondent shall bear the costs of this application on an attorney and client scale.

Bulawayo Legal Projects Centre, Applicant's Legal Practitioners