

ESTATE LATE DERECK RONALD HILL

versus

RUTENDO CHASI

and

NGONIDZASHE CHASI

and

EMMANUEL CHASI

and

TAURAI DORCAS MATEMBA

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 13 JUNE 2017 AND 15 JUNE 2017

Urgent Chamber Application

J T Tsvangirai for the applicant

Ms M Chasi for the respondents

MATHONSI J: According to the sheriff's return of service, the notice of set down for the hearing of this urgent applicant was served on 12 June 2017 at 11:27 hours upon C. Nyoniwho is authorized to receive process on behalf of all the respondents. Despite such service all the respondents did not bother to attend court. Instead they sent their elderly mother, Mercy Chasi to appear on their behalf. Ms Chasi stated that she is the one who is in occupation of the house in dispute, number 37 Sturton Drive Richmond Bulawayo, which she occupies with her four grandchildren.

She stated that she was unable to make any submissions regarding the merits of the application but only had a request to make. The request was that when she informed the respondents that court papers for the hearing had been served and that they were required to attend court today, the second respondent directed her to appear before me and seek a postponement to a later date to enable them to attend. The first respondent is a teacher at some school in Mashonaland while the second respondent works at a Mine in Silobela. The third and fourth respondents do not even live in Bulawayo but elsewhere.

HB 165-17
HC 1510-17
XREF HC 1433-17
XREF HC 1433-17

I desired to know from Mrs Chasi, if indeed she is the one who occupies the house with her grandchildren, how she came to be in occupation when the papers before me show that they were lawfully evicted by the messenger of court on 20 April 2017. She became evasive but firmly stating that she was unwilling to say anything in that regard as she was only a messenger. It is her children who have authority from her husband, their father, on such issues.

It became apparent that the old lady and her children, the respondents, were merely trying to confound both the applicant and the court. For that reason I refused to grant a postponement. The respondents were properly served with the notice of set down and chose not to appear. Surprisingly when Mr *Tsvangirai* for the applicant made submissions in support of the application, Mrs Chasi suddenly acquired knowledge of the merits. She stated that the respondents had noted an appeal to the Supreme Court against the judgment of this court which is sought to be executed, a clear case of playing games with a court of law.

The applicant holds title to Lot 1 Glenville Township of Subdivision 1 of Trenance in the District of Bulawayo also known as 37 Sturton Drive Richmond Bulawayo, by Deed of Transfer number 268/78 registered on 8 February 1978 in favour of the late Dereck Ronald Hill. The applicant obtained an order for the eviction of the respondents from that property in the magistrates court whose execution was delayed after an appeal was noted to this court against that judgment.

When the respondents saw the folly of prosecuting that appeal and withdrew it, the task of evicting the occupants was not for the weakkneed or indeed the faint-hearted. According to the messenger of court's return of service; he made the following remarks after undertaking that exercise on 20 April 2017;

“Defendant seen. No keys obtained, full eviction carried out. Premises handed over to Mr Ndlovu (Plaintiff's representative). I was accompanied by Assistant Inspector Dube and 15 Police officers from ZRP Saucetown. Police assistance was necessary due to the hostile attitude of the said defendant, relatives and hired thugs.”

That turned out to be a pyrrhic victory because according to papers filed by the applicant in HC 1206/17, an urgent application filed on 5 May 2017 against the present respondents, after the eviction on 20 April 2017 the respondents committed an act of spoliation. Resorting to self-

HB 165-17
 HC 1510-17
 XREF HC 1433-17
 XREF HC 1433-17

help and exhibiting a regrettable disregard for the law, the respondents moved back into the property, threatened the caretaker and carted their property back inside the house.

By judgment delivered on 18 May 2017 (HB 112/17), this court, per TAKUVA J, granted spoliatory relief in the form of a provisional order, to wit;

- “1. The 1st, 2nd, 3rd, 4th and 5th respondents be and are hereby ordered to restore possession of number 37 Sturton Drive, Richmond known as Lot 1 of Glenville Township of subdivision 1 of Trenance, Bulawayo to applicant on sight of this order.
2. The 1st, 2nd, 3rd, 4th and 5th respondents and all persons claiming occupation and possession through them be and are hereby evicted from number 37 Sturton Drive, Richmond, Bulawayo forthwith without notice.
3. The Sheriff Bulawayo be empowered to engage the services of some Saurstown Police or any police station to ensure the respondents are immediately evicted from 37 Sturton Drive, Richmond, Bulawayo.
4. This order shall remain valid even if the respondents decide to appeal against it.”

In granting that interlocutory order the Honourable Judge concluded at page 5 of the cyclostyled judgment that:

“For these reasons, I take the view that the facts of this case represent a clear resort to self-help, a brazen and total disregard of the due process which is the cornerstone of the fundamental principle of the rule of law.”

The applicant has now returned to this court with another urgent application this time seeking the following relief:

“TERMS OF THE FINAL ORDER SOUGHT

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

- (a) The respondents be and are hereby ordered to pay costs of the application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter applicant is granted the following relief:

- (i) Leave be and is hereby granted to execute judgment under HC 1206/17 pending finalization of appeal SC 312/17.”

It would seem that the applicant seeks relief which has already been granted in the judgment of TAKUVAJ that I have cited above which is to the effect that the provisional order

HB 165-17
HC 1510-17
XREF HC 1433-17
XREF HC 1433-17

granted remains valid even where an appeal is noted against it. According to Charles Leonard William Anderson who deposed to the founding affidavit, when the sheriff went to execute the spoliation order on 30 May 2017, he was served with a notice of appeal SC 312/17 filed by the respondents against the provisional order which the respondents relied upon to resist eviction for the second time despite the provision in the judgment appealed against that it would be unshaken by an appeal.

Anderson states that the appeal was noted against an interlocutory order without first applying for and obtaining leave from the judge who granted it, to lodge an appeal, meaning that the appeal is fatally defective. The applicant further complains that the respondents are abusing court process and should not be allowed to do so.

In terms of s43(2) (d) of the High Court Act [Chapter 7:06] no appeal shall lie from an interlocutory order or interlocutory judgment made or given by a judge of this court without the leave of that judge or, if leave has been refused by the judge, without the leave of a judge of the Supreme Court except in only three situations, namely where the liberty of the subject or the custody of minors is concerned, where an interdict is granted or refused and in the case of an order on a special case stated under any law relating to arbitration.

In HC 1206/16 this court granted a provisional order whose confirmation or discharge is yet to come on the return date. Ordinarily, a party aggrieved by the grant of a provisional order is expected to oppose its confirmation by filing a notice of opposition and opposing affidavit in terms of r247 of this court's rules. In the event that the respondent against whom a provisional order is made is of the view that it has created urgency which cannot await the normal procedure for set down of opposed matters, the practice in this court has always been that such a party is allowed to anticipate the return date and have the matter set down and heard urgently.

In this matter the respondents did not file any form of opposition to the provisional order. It therefore goes without saying that they did not anticipate the provisional order. What they did was to file an appeal against the order but without first seeking and being granted leave by the court. The order which the court granted was not one concerning the liberty of a person or

custody of minors. It was not an interdict and neither was it on a special case stated under a law relating to arbitration .

So if the order or judgment was interlocutory in nature, s43 (2) (d) required that leave to appeal be sought and obtained from the judge before an appeal could be lawfully made.

The question which arises is whether the order or judgment was interlocutory in nature. The term interlocutory refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation or which ordinarily would not have a final and definitive effect on the main cause. See *Gillespies Monumental Works (Pvt) Ltd v Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) 438A; *Jesse v Chioza* 1996 (1) ZLR 341 (S) 344G; *Dobrock Holdings (Pvt) Ltd v Turner and Sons (Pvt) Ltd and Another* 2008 (2) ZLR 153 (S); *Mafu v Ncube and Another* HB 4-16.

In my view, to the extent that a provisional order grants only interim relief, with the final relief to be decided on its return date, it is generally interlocutory in nature. It could be said though that the issue of an order being a provisional one, does not *per se* determine whether it is interlocutory or not because there may be some which have a final and definitive effect. My thinking however is that does not arise in the present matter. This is because of the nature of the relief that the court granted.

The respondents were evicted in terms of an order of a court of law which was valid and had not been suspended meaning that it was enforceable and had to be complied with. They contemptuously disobeyed that court order by returning to the property in question using violence and other unlawful means. They were clearly in contempt of court and the applicant had an option to pursue that route or to seek spoliatory relief. It settled for the latter resulting in the order for restoration of the status *quo ante* being granted. It is that order which they have purported to appeal against instead of opposing confirmation of the provisional order. For them to file a valid appeal they were required by s43 (2) (d) of the Act to seek leave. In the absence of leave there can be no valid appeal.

There is however method in all this. The filing of that appeal was meant to frustrate the execution of the judgment of the court by a thoroughly contemptuous lot which has no respect

HB 165-17
HC 1510-17
XREF HC 1433-17
XREF HC 1433-17

whatsoever for the process of the court. This was in the forlorn hope that they could legitimize their unlawful occupation of the property by a notice of appeal thereby gaining more time perpetuating an illegality.

While s85 (2) of the constitution allows even a person who has contravened a law to approach a court alleging that a fundamental right or freedom contained in Chapter 4 of the constitution has been infringed, it is no application to the situation involving the respondents. They have not approached any court alleging that. Therefore the time honoured principle of our law that people are not allowed to shelter under the court when they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court applies. In other words litigants should not come to court with dirty hands. See *Deputy Sheriff Harare v Mahleza and Another* 1997 (2) ZLR 425 (H) 426 A-C.

What it means is that even putting aside the fact that the purported appeal filed by the respondents is invalid, the fact remains that these are people who filed that appeal under dishonest circumstances when they were already in contempt having defied a court order which evicted them from the property. They therefore cannot reap anything from that misadventure, theirs only being a harvest of thorns.

I am therefore satisfied that the applicant has made a case for the relief sought. In the result the provisional order is granted in terms of the draft order.

Dube-Tachiona and Tsvangirai, applicant's legal practitioners