HB 44-17
HC 267-17 & HC 303-17
XREF SC 02-17, HB 351-16
XREF HC 1546-15

KOMBORERAI NHENGA aka CHAPUNGU
versus
EPHERT SAKA
and
EGESI GAREPI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 14 FEBRUARY 2017 AND 3 MARCH 2017

Urgent Chamber Application and Counter application for leave to execute pending appeal

S Siziba for the applicant
W Ncube for the respondent

MOYO J: This is an urgent application wherein the applicant seeks the following interim relief:

> "Pending finalization of this matter, the following interim order is hereby granted to Applicant.
>
> a. The Sheriff of the High Court of Zimbabwe or his lawful deputy or assistant in Bulawayo be and is hereby directed to take all such measures as are legally necessary to evict the Respondent and/or her agents from stand number 3290 Magwegwe North, Bulawayo and restore the 1st Applicant and all those claiming through him into their peaceful and undisturbed occupation of the aforesaid property and in so doing this order shall be his/her warrant.
> b. Respondent and/or her agents and anyone claiming through her be and are hereby ordered not to interfere with Applicants' occupation of stand number 3290 Magwegwe North, Bulawayo.
> c. In the event of the Respondent or her agents failing, neglecting or refusing to comply with the order in paragraph (b) hereof above, the Member-In-Charge at Magwegwe Police Station or any of his details or any Police or Peace Officer in Zimbabwe, be and are hereby directed to arrest and detain the Respondent and any such or person(s) as may be aiding the Respondent and take them to any court of competent jurisdiction on charges of contempt of court or any such competent charges for prosecution in terms of the law."

On the other hand the respondents filed a counter chamber application for leave to execute their judgment pending appeal. The brief facts of the matter are that the first applicant, who is a tenant of the second applicant, at 3290 Magwegwe North was dispossessed of these premises by the respondent. Respondent allegedly went to first applicant and brandished a court order demanding that first applicant vacates stand No. 3290 Magwegwe North. He (first applicant), immediately contacted second applicant who referred him to his current legal practitioners of record, who in turn advised him that an appeal had been noted against the judgment whose court order the respondent had brandished on 24 of January 2017. On the evening of 25 January 2017, respondent then pounced on first applicant and his family with a gang of thugs numbering 10-15 people. They were ordered to vacate the premises, tried to resist but finally succumbed. The respondents and the accompanying thugs locked first applicant and his family outside the premises and threw their belongings out. It was allegedly raining and chilly and they had to seek refuge from the neighbours.

The respondent on the other hand refutes the allegations made by the first applicant. In so doing the respondent avers that upon knowledge that the eviction dispute between herself and the applicants had been finalized, and that the court had made an order to the effect that applicants should vacate, she then went with the court order to advise the tenants that there was now a court order for their eviction and that if they were not willing to vacate the premises then a writ for their ejectment would be sought. Respondent avers that through and through everything was done amicably.

The first applicant then advised the respondent in the company of her son and a member of the Residents Association that his wife had gone to arrange alternative accommodation and that she would be coming with the removals truck to load their belongings. She eventually came and they loaded their stuff and left.

The first applicant on the other hand alleges that he was despoiled of his peaceful and undisturbed possession of the premises. Respondent alleges that there was never any act of spoliation on their part but that everything was mutual.

In this kind of action an applicant needs to establish and prove the following:

a) That he/she was in peaceful and undisturbed possession of the property being the subject matter of the spoliation proceedings.
b) That he/she was unlawfully dispossessed of same without his consent.

The law on spoliation was aptly put in the case of *Botha and Another* v *Barrett* 1996 (2) ZLR 73 per GUBBAY CJ. The learned Chief Justice as he then was stated thus:

"It is clear that in order to obtain a spoliation order two allegations must be made and proved. These are:

a) That the applicant was in peaceful and undisturbed possession of the property,
b) That the respondent deprived him of the possession forcibly or wrongfully against his will."

I must hasten to point out that in this matter, the fact that the applicant was in peaceful and undisturbed possession of the premises is not in dispute. It is also common cause that the parties were locked in litigation over the possession of the same property. It is also common cause that the court in the eviction proceedings found in favour of the respondent.

What is in dispute here is whether the first applicant was unlawfully dispossessed of the premises against his will. First applicant avers that 10-15 thugs were brought in by the respondent and threw out his belongings forcibly removing him from the premises. The first applicant had to put up with neighbours. Conspicuously absent though is an affidavit by the neighbours who witnessed the forcible eviction and who actually rendered assistance to applicant by providing accommodation. The other problem again is that respondent avers that second applicant's assets are still housed at the premises as first applicant only co-operated by removing himself and his belongings from the premises. Now if the 10-15 thugs had indeed been hired and if they threw out belongings indiscriminately there, one would have expected the second applicant's belongings to be thrown out as well. These two points in a way give credence to the respondent's case. An applicant who approaches the court has a duty to present his/her case fully in the founding affidavit and also answer fully the challenges presented by the defence in their answering affidavit. Applicants are being challenged on these two points that I consider important to the resolution of the facts, they however remain mum on them in their answering affidavit. In fact in the answering affidavit they emphasise the absence of the Deputy Sheriff.

We are all aware that there is nothing sinister with a party advising the other of the existence of a court order and its consequences. There is also nothing sinister in advising a party of a court order and giving them a chance to comply before execution.

In any event where the court is not fully satisfied with the version as presented by the applicant like in this case, and where the respondent's denials cannot be found to be far fetched or clearly untenable, that they could be rejected, the court can choose not to decide the dispute of fact and dismiss the application. Refer to the case of *National Union of Mine Workers* v *Free State Consolidated Gold Mines (Operations) Ltd* 1989 (1) SA 409 (O) at 415.

It was further held in the case of *Die Dros* 2005 (4) SA 207 (C) at 217 that affidavits in motion proceedings must contain factual averments that were sufficient to support the cause of action on which the relief that is being sought is based.

Applicant should have presented adequate facts that point to lack of consent especially in the answering affidavit. Clearly applicant should have attached one of the neighbours' affidavits, even at answering affidavit stage, to show that indeed an independent party vouches for their case. Failing to do so, amounts to a failure to lay before the court adequate information upon which the court can resolve any factual disputes. Applicants failed to do that at their own peril as each litigant must prove before the court what they have alleged.

On the other hand, the respondents went to great lengths in establishing their defence. It is for these reasons that I will infer from the facts that this whole application came as an afterthought after first applicant had consented to vacate the premises and after he had done so. It then in my view becomes an abuse of court process tainted with the element of dishonesty by a litigant who deliberately twists facts to achieve a certain end.

It is for these reasons that the urgent application will be dismissed with costs at a punitive scale. Refer to the case of *Makhuva* v *Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 399 A –C.

The Counter Application

I then move on to deal with the counter application. Simultaneously with the urgent application dealt with above, I dealt with a counter application for leave to execute the judgment

of this court pending appeal. The respondent filed a counter application for leave to execute the judgment of this court pending appeal on the basis that the applicants have no prospects of success at all. For the sake of convenience, I will still refer to the parties as per the main application. That is applicants in the main application will be referred to as applicants herein and the respondent in the main application will still be referred to as respondent herein. The court in the eviction matter found that the applicants have no case at all and were merely defending the proceedings to buy time. In that matter, the applicants strenuously opposed the eviction on the basis that second applicant's father's estate had a claim to the property in question. To date no such claim has ever been made. The claim has also supposedly prescribed, since the purported agreement of sale was entered nearly 32 years ago. Applicants' own version in the eviction matter was that the purchase price was never paid in full. In responding to the counter application, second applicant states in paragraph 6 that;

> "I deny the applicants' contention that the appeal referred to above has no prospects of success. I am advised by my legal practitioners of record that the appeal has good prospects of success. The Hon. Court erred in fact and at law in its finding that I had no legal right over house number 3290 Magwegwe North Bulawayo, when in fact the house in question belonged to my late father's estate on the strength of the agreement of sale. My occupation of the house was neither fraudulent nor illegal."

Now the second applicant is aware of the issues that respondent raises in the counter application which render the appeal wanting in so far as prospects of success are concerned, he doesn't go there, he doesn't explain why it is his assertion that the court erred, he doesn't explain why he believes there are prospects of success and why the issues raised by the respondent in the counter application are porous. No, he merely makes a bold assertion on the basis of the advice given by his legal practitioners that he has good prospects of success. He doesn't tell us why his legal practitioners believe so, he doesn't go on to attack the application on the submission of prospects of success. He merely goes on to say the house belongs to his late father on the strength of an agreement of sale. He conspicuously avoids factually establishing why the agreement should be upheld, he avoids tackling the issues raised by the respondent on the problems he faces regarding the alleged agreement of sale. He does not tell us why no claim has

been made in favour of his late father's estate to date, he does not tell us why the property is not in his father's estate to date, and what he would do about it, he does not comment on the validity or otherwise of the agreement in light of the attacks by the respondent thereon. Clearly one is persuaded in these circumstances to hold the view that all the second applicant wants is to retain possession of the property despite all odds and collect rentals. Clearly from his own affidavit no steps have been taken, neither is there an intention to take same in future to validate his possession of the property. In their heads of argument, applicants dwell on section 120 of the Administration of Estates Act [Chapter 6:01]. That the purported sale between respondent and the executrix in the estate of the late Bester Philip is invalid for want of compliance with section 120. However I do not find any substance in this argument as firstly the validity or otherwise of the agreement of sale is none of applicant's business in my view. The doctrine of privity of contract dictates that the two parties to the sale that is, the executrix and respondent should see to that agreement's validation. That is not applicant's business. Even if the agreement were to be found to be invalid for argument's sake, that in my view does not take applicant's case anywhere for it does not translate into a right of occupation by the applicants, as the estate of the late Bester Philip is the one vested with ownership and occupation rights until when a court of law finds otherwise. The executrix is the one vested with the authority to grant ownership or occupational rights.

Now how and when will a court of law pronounce on the ownership or right of occupation by the applicants when they sit back and do nothing about an agreement that was allegedly entered into more than 30 years ago? An agreement whose terms per applicant's own case, were not fulfilled by second applicant's late father? I thus will not even go on to consider the implication of section 120 on the prospects of success of the appeal as I consider that to be totally irrelevant. Applicants are in my view just clutching at straws.

In a case of this nature the court exercises a discretion after having had regard of the following;

1. The preponderance of equities
2. The prospects of success on appeal

3. If the competing interests are equal, the balance of hardship to either party.

Refer to the case of *Econet Pvt Ltd* v *Telecel Zim Pvt Ltd* 1998 (1) ZLR 149 (HC)

In relation to the preponderance of equities, the respondent has proven ownership rights over the property in question yet the applicants are merely making bold assertions. There are also no reasonable prospects of success as even the second applicant himself has failed in his opposition in the counter application to establish them.

There are also no equal competing interests as a result. Clearly, I would not exercise my discretion in favour of the applicants in this matter, nothing has been shown to warrant that avenue. On the other hand, the respondent has shown that the applicants have absolutely no claim to sustain the possession of the premises but are merely throwing everything in to retain possession and delay the matter.

I accordingly make the following order;

a) The urgent chamber application in HC 267/17 is dismissed with costs at an attorney and client scale.
b) The counter application in HC 303/17 succeeds with costs at an attorney and client scale.

Ndove, Museta & Partners, applicants' legal practitioners
Messrs Mathonsi Ncube Law Chambers, respondents' legal practitioners