

WINSTON ANDRE McCONVILLE (On behalf of Buck Gordon Lohan)
versus
HUGO NAGEL
and
THE MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 21 & 28 November 2013

Urgent Chamber Application

S Simango, for the applicant
Advocate R.H. Goba, for the 1st respondent
No appearance for the 3rd respondent

MAWADZE J: This is an Urgent Chamber Application for a provisional order whose interim relief sought is stated as follows,

“INTERIM RELIEF GRANTED

Pending the determination of this matter applicant is hereby granted the following relief;

The eviction of Buck Gordon Lohan is hereby reversed pending;

1.1. The determination of an application nullifying the letters of administration of applicant’s sister’s Estate which was issued in favour of the first respondent in HC 8896/13.

1.2. Should applicant and all the persons claiming occupation of the aforesaid property through her name have been evicted fully or in part by the date and time of the grant of this order, then this order should authorise him on an interim to resume lawful occupation of the aforesaid property being House No 97 Harare Drive Marlborough, Harare.

SERVICE OF THE PROVISIONAL ORDER

This order should be served by the Deputy Sherriff or any person in the firm of applicant’s Legal Practitioners” (*sic*)

The terms of this final order are couched as follows

“TERMS OF FINAL ORDER SOUGHT

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

1. Buck Gordon Lohan be and is hereby restored to the premises where he has been staying being No 97 Harare Drive, Marlborough, Harare.
2. The respondent be and is hereby ordered not to interfere with Buck Gordon Lohan in any manner.
3. Respondent to pay costs of suits on a higher scale. "(sic)

I am constrained at this stage to comment fully on the appropriateness of the nature of the interim relief sought by the applicant. The terms of the provisional order sought are difficult to appreciate at law. I shall not deal with this aspect in view of what subsequently happened during the hearing of the matter.

The brief background facts of the matter are as follows;

The first respondent Hugo Nigel was married to one Collen Cathy (nee McConville) who passed on in South Africa on 4 March 2013 and had her remains interred in Zimbabwe. The applicant is a brother to the late Collen Cathy (nee McConville) (hereafter the late Cathy), hence he regards the first respondent as a brother in law. The late Cathy is survived by a son one Buck Gordon Lohan born on 20 January 1983 (is now 30 years old (hereafter Buck). Buck is a step son to the first respondent Hugo Nagel. It is alleged that Buck is mentally disturbed.

The late Cathy who died testate was married to the first respondent in terms of the Marriage Act [*Cap5:11*]. Apparently there were no children born of this marriage.

It would appear that the late Cathy was staying at No 97 Harare Drive, Marlborough, Harare with her son Buck and the first respondent. Applicant alleges that after the death of late Cathy the first respondent took the law into his own hands and evicted Buck who is mentally ill from No 97 Harare Drive Marlborough Harare which house is part of Buck's mother's estate. It would seem the legal battle between the applicant and the respondent is multifaceted as applicant takes issue with how first respondent registered the estate of the late Cathy, the validity of the joint will and the correctness of information supplied by the first respondent to the Master. These issues however are not relevant to this application but are raised by the first respondent who believes applicant has launched an unwarranted but relentless legal battle with him in order to cripple him financially as he is now unable to proceed with the administration of his wife the late Cathy's estate without overcoming these legal hurdles. The first respondent who is now 70 years old also believes that these legal battles have an adverse effect on his health.

As regards this urgent application, applicant alleges that after the unlawful eviction of Buck the applicant has to take care of Buck at a great expense as the applicant stays in Gwanda and had to find a house to rent for Buck in Harare. Applicant alleges that he no longer has the means to afford such an expense and would rather have Buck return to stay at No 97 Harare Drive Marlborough Harare. The date on which Buck was allegedly unlawfully evicted by the first respondent is not given. According to the applicant the urgency of this matter arises from the fact Buck is mentally disturbed and needs proper care and shelter. The applicant attached an affidavit by Dr Chibanda, a medical doctor dated 25 July 2013 and a Psychiatric valuation report dated 26 June 2013 also by the same medical doctor which both relate to Buck's mental state.

The application is opposed by the first respondent who filed an opposing affidavit and other documents which all in all cover 116 pages. I have no intention of dealing in any meaningful detail with contents of the first respondent's opposing affidavit and annexures thereto. Suffice to state that on the merits the first respondent denies evicting Buck as alleged and puts in issue Buck's mental state as alleged by the applicant.

Advocate Goba for the first respondent raised points *in limine* he submitted, if properly considered; dispose of the matter without consideration of the merits case.

Advocate Goba took the following preliminary points,

- (1) That on 25 October 2013 the applicant had brought before the Harare Magistrates Court a substantially similar application seeking the same relief which application was dismissed by the same court. According to *Advocate Goba* the correct remedy for the applicant in the circumstances is to appeal as the judgement by the Magistrates Court is extant or operative. This Urgent Chamber Application according to *Advocate Goba* is not only ill informed but doomed to fail as applicant has simply gone on a forum shopping, a practice frowned upon by this court. It is *Advocate Goba's* view that since the Magistrate Court's judgement is extant, these proceedings are improperly before this court.
- (2) That the applicant lacks *locus standi in judicio*. *Advocate Goba* submitted that if Buck lacks mental capacity to institute these proceedings on his own, he can not, for the same reason authorise the applicant to act on his behalf hence these proceedings are null and void. *Advocate Goba* submitted that a curator *ad litem* should be appointed to represent Buck or act on his behalf if at all Buck is mentally disturbed.

(3) That the urgent chamber application disclosed no cause of action and that the interim relief sought is not only bad at all but incomprehensible.

When I received the urgent application on 20 November 2013 I reluctantly set it down for hearing as I had realised that on the papers filed of record applicant had not complied with the mandatory provisions of r 249 (1) (a) of the High Court Rules 1971 which relate to the appointment of a curator *ad litem* in any proceedings involving a person suffering from mental disability. I believed that applicant had probably in the haste to file this urgent chamber application omitted to include documents which show that applicant had been appointed Buck's curator *ad litem*. I was obviously wrong.

Mr *Simango* for the applicant had no meaningful submissions to make in response to the points taken *in limine* by *Advocate Goba* and as regards none compliance with r 249 (1) (a) of the High Court Rules 1971. After some feeble attempts to respond to the points *in limine* Mr *Simango* to his credit gathered the necessary courage expected of an officer of this court and withdrew the application tendering what he called "wasted costs."

Apparently *Advocate Goba* was unimpressed. He submitted in argument that the applicant can not competently withdraw this application after the parties had argued this matter on the points *in limine*. *Advocate Goba* submitted that this court is therefore seized with this matter and there is need for this court to dismiss the application with an appropriate order of costs. Mr *Simango* on the other hand submitted that he is entitled to withdraw the application at the stage he did and tender wasted costs which he said covered all costs incurred by the first respondent. It is precisely for this reason that I was compelled in the circumstances to write this short judgement.

I hold the firm view that an applicant being *dominus litis* can withdraw an application as any stage before the court has pronounced the judgement. The reason for this is very simple in my view. Once a withdrawal is made at any stage, there are no proceedings before the court. The proceedings are terminated. *In casu* once Mr *Simango* for the applicant withdrew the application verbally for the reasons he gave (or for whatever reason) it meant that there is no application before the court. It means that there are no longer any issues of contestation between or among the parties involved upon which the court can make a ruling. It will be improper, as *Advocate Goba* suggests that the court should proceed to rule on the matter and dismiss the application. The withdrawal of the application by Mr *Simango* for the applicant is competent and proper in the circumstances.

Lastly I turn to the issue of costs. The question of costs is within the purview or discretion of the court. While I agree that the term “wasted costs” may be vague in the circumstances, I do not believe that should be a bar to applicant’s decision to withdraw the application.

The applicant cannot in the circumstances of this case escape an adverse order of costs. This application was not only ill advised but bad at law. Applicant had unsuccessfully sought the same relief in the Magistrates Court. Applicant was advised that he lacks *locus standi* in the matter. If the applicant believed otherwise one would have expected applicant to appeal against that ruling but instead applicant proceeds to institute these proceedings on a certificate of urgency seeking the same relief in this court as a fresh matter well aware that he lacks *locus standi* as the judgement by the Magistrate Court is extant. In addition to that applicant who is representing a 30 year old man fails to appreciate what is expected of him at law if he is to competently represent Buck who is allegedly mentally disturbed. The rules of the court, that is r 249 (1) (a) are disregarded. Such conduct by the applicant should be discouraged as the courts are unnecessarily burdened with applications which are not only bad at law but doomed to fail. I agree with *Advocate Goba* that this is a proper case where the courts should descend heavily on applicant’s knuckles with a nine pound hammer by ordering applicant to shoulder the burden of costs on a higher scale.

In this result, I make the following order,

1. The urgent chamber application be and is hereby withdrawn.
2. The applicant shall pay the costs of this application on a legal practitioner- client scale.

Nyikadzino Simango & Associates, applicant’s legal practitioners
T.H Chitapi & Associates, 1st respondent’s legal practitioners