GODFREY MUNYAMANA
and
ANOTHER
versus
FRANK HUMBE
and
ANOTHER

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 November 2011 & 8 April 2022

Urgent Application Spoliation Order

E T Muhlekiwa, for the applicants'
TST Dzvetero, for the respondents'

CHITAPI J: This is an urgent application for a spoliation order. It was accompanied by a draft provisional order which reads as follows:

TERMS OF FINAL ORDER SOUGHT

That you show cause:

1) That the respondents, their agents and all those claiming title or occupation through them be and are hereby interdicted from interfering with the applicants' possession and enjoyment of the property known as *No. 67 Guild Crescent, Hogerty Hill, Borrowdale, Harare also known as "certain piece of land, situate in the district of Salisbury, called remainder of 67 Guildford Estate Township of Subdivision H of Guildford of Borrowdale Estate measuring 4603 square metres held under Deed of Transfer No. 1447/2009.*
2) That the respondents pay the costs of this application on an attorney and client scale.

TERMS OF INTERIM RELIEF SOUGHT

Pending the return date, the applicants are granted the following relief:

1) The respondents and all those claiming occupation or title through them forthwith vacate the immovable property known as *No. 67 Guild Crescent, Hogerty Hill, Borrowdale, Harare also known as "certain piece of land, situate in the district of Salisbury, called remainder of 67 Guildford Estate Township of Subdivision H of Guildford of Borrowdale Estate measuring 4603 square metres held under Deed of Transfer No. 1447/2009.*
2) In the event that the respondents and their agents do not vacate the said immovable property forthwith or immediately upon service of this order, the Sheriff with the assistance of the members of the Zimbabwe Republic Police, if necessary, be and is hereby authorized to evict the respondents, their agents at *No. 67 Guildford Crescent, Hogerty Hill, Borrowdale, Harare* and all those claiming title or occupation through the respondents and to restore and hand over the immovable property and its keys to the applicants' or their agents and or nominees.
3) The respondents shall not appeal against this provisional order without obtaining leave of this court.
4) The respondents be and are hereby ordered to pay costs of suit on a legal practitioner and client scale.

The brief summation of the facts is outlined in order to contextualize the dispute so that the determination of the matters *in limine* which the respondents raise is not made in the air. The applicants claimed to be the registered title holders of a property called the remainder of 67 Guildford Estate, Township of Subdivision H of Guildford of Borrowdale Estate measuring 4603 square metres hold under Deed of Transfer 1447/2009. An immovable property in the form of a house is built on the property. The applicants averred that they have enjoyed peaceful and undisturbed possession of the house since 2009 until 14 November 2020, when the respondents and some hooligans broke into the house and forcibly evicted the applicant. The respondent allegedly threw them out of the house, the applicants household goods and furniture outside the yard surrounding the house. The respondents are alleged to have dispersed following the intervention of the police support unit. The first respondent was alleged to have been arrested whilst the rest of the gang escaped.

The applicants averred that despite having been arrested on 17 November 2020 and released, the first respondent again teamed up with his group of hired hooligans and forcibly took occupation of the applicants' immovable property without the applicants' consent. The applicants' averred that the conduct of the respondents amounted to spoliation.

The applicants attached to the founding affidavit pictures of household property strewn outside a durawall. They also chronicled the history of their relationship with the respondents. It is noted that the first respondent entered a sale agreement for the purchase of the property. Several criminal and civil cases were instituted for and against each other by the parties. The history aforesaid would not be of much relevance to spoliation which is in simple terms a restitutory remedy of a *status quo* ante whereby one party has taken the law into his or her own hands and forcibly despoiled another of possession of a thing, movable or immovable.

When the application was set down, the parties appeared before me with the respondents raising points *in limine* that the applicants had adopted a wrong procedure, that the application was not urgent, that the applicant used the wrong form of application and that the application did not disclose a cause of action.

It was resolved to deal with the first point *in limine* as its disposal would inform whether or not it was necessary to deal with the other points *in limine* and / or the application on the merits. The respondent submitted that the applicants had filed an earlier urgent application in case number 6767/20 on 18 November 2020 claiming the same. It is common cause that the actual foundation of case number HC 6767/20 was the same as in the current case. In fact the current application is a replica pf case number HC 6767/20. Case number HC 6767/20 was set own before CHINAMORA J on 24 November 2020. The parties agree that the learned judge struck the application off the roll for want of proper form. The learned judge determined that the application did not comply with r 241 (1) of High Court Rules, 1971 in that the applicants used form number 29B instead of form 29 with appropriate modifications as required by the rules. The applicants on 25 November 2020 filed this case under a different case number and used the correct form 29 with modifications.

The point *in limine* which arose on the propriety of this applications was the respondents argument to the effect that the applicants could not bring back the same application without seeking reinstatement since the matter having been struck off the roll was no longer in existence. The applicants argued that since the matter had been struck off the roll, they were within their rights to

file a fresh application. The issue for determination was therefore whether or not the present application was competent and properly before the judge for determination.

The starting point is to understand the order of Chinamhora J in case number HC 6767/20. It was made on 24 November 2020 and reads as follows:

IT IS ORDERED BY CONSENT THAT:

1) The application be and is hereby struck off the roll.

2) The applicant shall pay the respondents wasted costs on the ordinary scale.

The applicant in the answering affidavit averred that it was the learned judge who after the applicants sought to apply for condonation for the use of an incorrect form then suggested that the matter be struck off the roll and the applicants file a fresh application. The applicants also averred that the effect of striking the matter off the roll was that the same was considered totally defective and a nullity which cannot be reinstated. The matter falls on the interpretation of practice direction 3/2013.

Practice Direction 3 in material particulars reads as follows:

Application

1) This practice direction applies to all superior courts of Zimbabwe.

General Note

2) With a view to ensuring the uniform use and application of the terms. 'Struck off the roll'; postponed *sine die* 'and' removed from the roll; the following changes to the current practice takes effect from 1 January 2014.

Struck off the roll

3) The term shall be used to effectively dispose of any matters which are fatally defective and should not have been enrolled in that form in the first place.

4) In accordance with the decision in *Matanhure* v *BP Shell Marketing (Pvt) Ltd* 2004 (2) ZLR 147 (S) and *S* v *Ncube* 1990 (2) ZLR 303 (S); if a court issues an order that a matter is struck off the roll the effect is that such a matter is no longer before the court.

5) Where a matter has been struck off the roll for the failure by a party to abide by the rules of the court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

> Provided that a judge may on application and for good cause shown, reinstate the matter on such terms as he deems fit.

The respondent counsel submitted that it was necessary that the applicants should have applied for reinstatement of the application instead of just resetting it after correction. In the answering affidavit which was filed after I granted leave for its filing the applicants averred in para 8 therefore as follows:

> "5. Consequently: I gave instructions to my legal practitioners to apply for condonation over the bar over the use of the said form. It was at this point that the Honourable Justice proposed that the matter be struck off the roll to enable us to file a fresh application that complied with the rules, instead of him having to hear and make a determination over arguments relating to the condonation application. The respondents even made submissions to the effect that they have no issues with us making a fresh application as we have done *in casu*. By consent the application was struck off the roll"

It is important to note that the applicant does not state that the learned judge made any order in relation to the fate of the application other than to endorse that the matter had struck off the roll by consent. The learned judge did not order a departure from the provisions of practice direction 3 of 2013 aforesaid.

In relation to the submission by the respondents' counsel that the matter could not be automatically reset for hearing without reinstatement being granted the applicants stated as follows in para 6 of the answering affidavit:

> "6. Accordingly, the preliminary point lacks merit. The facts and circumstances of this matter requires the intervention of this court on an urgent basis. The route proposed by the respondents would no doubt result in urgency being lost. In any event, where a matter is truck off the roll. I am advised, such a matter will be fatally defective and a nullity. One cannot therefore seek an order of the court to reinstate an application that has been adjudged to be fatally defective."

If one has regard to the practice direction, a matter struck off the roll is one that is fatally defective and should not have been set down in the first place. The fatal defectiveness referred to is not one relating to the substance or merits of the matter but to form. In other words such matter cannot be heard because of its defective form. The matter which struck off the roll, is returned to the Registry. It remains a pending matter unless withdrawn formally. Once withdrawn then the applicant is free to file a fresh application without duplicating applications.

The practice direction gives the applicant a window of thirty (30) days from the date that the matter was struck off the roll to rectify the defect and make the application rule compliant failing which the matter is then deemed to be abandoned. The submission in the applicants affidavit

that an application which is struck off the roll becomes a nullity is incorrect within the context of the practice direction because the practice direction recognizes the matter as a pending case not proper to the set down without rectification of the rule compliance deficiencies. The expression that the effect of an order to strike the matter off the roll that the matter is no longer before the court does not mean that the matter has died of natural death.

The matter is given a limited life span during which the applicant can remedy the defect and reset down the matter.

The *proviso* to for reinstatement on application to the judge in my view means that, notwithstanding the lapse of the thirty (30) days for rectification in which case the matter is deemed abandoned, the deemed abandoned matter may be reinstatement on application for good cause. Put simply, an applicant whose matter has been deemed abandoned after expiry of the 30 day window for rectification of a matter which has been struck off the roll may make a chamber application to the judge for reinstatement of the matter. The applicant must show good cause for the reinstatement. The judge may reinstate the matter on such terms as he/she deems fit or dismiss the application. This in my interpretation is the meaning to be ascribed to the *proviso.* In terms of practice directi 3 of 2013 an applicant whose matter is struck off the roll is therefore not required to apply for reinstatement of the matter unless thirty (30) days have passed without rectification and the matter deemed abandoned. The submission by the respondents that the applicant ought to have applied for condonation and reinstatement has no legal basis since the second application was filed a day after the first application was struck off the roll.

The position of the matter upon the filling of the second similar application save for correction of form 29 was that there were now two pending matters with the second matter being referred to the judge. The previous one having been struck off the roll. The question is whether or not it was competent for the applicant to bypass or ignore correcting the struck off the roll application and without withdrawing it, to file a similar application. In my view case No HC 6767/20 remained a pending *lis*. The respondent did not raise the defence of *lis pendens* expressly. However the factual and legal position is that the current application was filed in the face of a pending similar *lis.*

The court has a discretion in circumstances where two similar matter are pending to either stay the second month pending determination of the first *lis* or to proceed regardless of the

pendency of the first matter. The court is guided by considerations of justice, equity and balance of convenience see *Keyter NO* v *Van de Menlen & Anor NNO* 2014 (5) 215 (ECG) at 215, a judgment quoted by ZISENGWE J in the case *Chigami Z Syndicate & 2 Ors* v *Cleo Brand Investments (Pvt) Ltd* HMA 14/20.

In casu the case concerns a spoliation wherein the respondents allegedly took the law into their hands and forcibly dispossessed the applicants of peaceful and undisturbed possession of the dwelling house which they occupied. If such facts are proved, the matter becomes important and raises constitutional rights of a person having been violated. The court in such a case is inclined to hear the matter notwithstanding the pendency of the first matter. The respondents suffer no prejudice if the application is heard because the objection they raised relates to procedure and not substance. The objection raised by the respondents that the applicants used the wrong procedure for bringing this application therefore fails.

This judgment has delayed and it is regretted but attributable to confusions which affected the fluidity of the court operations due to the COVID 19 effects. It is up to the applicant if they wish to pursue the application further to advise the Registrar in writing of such intent so that the record is referred back to the judge for set down of continuation of the hearing.

In the result, the following is made:

(i) The point *in limine* is dismissed.

(ii) The applicant if minded to prosecute the application further should within five (5) days of the date of this judgment advise such intent in writing to the Registrar for the matter to be set down for continuation.

(iii) Costs are reserved.

Muhlekiwa Legal Practice, applicants' legal practitioners.
Messrs Antonio & Dzvetero, respondents' legal practitioners.