HB 57-18
HC 624-18
XREF HC 3196/17
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SAMUKELISO MABHENA
versus
EDMUND MBANGANI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 28 FEBRUARY AND 8 MARCH 2018

Urgent Chamber Application

Ms C Nunu for the applicant
Ms P Mvundla for the respondent

MATHONSI J: The applicant seeks a final order, by certificate of urgency, interdicting the respondent from executing a judgment of the magistrates court sitting at Bulawayo issued on 23 February 2018, the same day that this application was filed, in terms of which eviction of the applicant from house number 9 Windsor Road, Kumalo North, Bulawayo, was ordered together with holding over damages and costs of suit. The reason for seeking a stay of execution is that the applicant has appealed against that judgment and would like to interdict her eviction pending the determination of that appeal. In addition to that, in case number HC 3196/17, which is a summons action instituted out of this court on 7 December 2017, she has sued the respondent for an order confirming cancellation of an agreement of sale entered into between herself and the respondent and reversal of the transfer of stand 4008 Kumalo Township of stand 4125 Kumalo Township, also known as No. 9 Windsor Road, Kumalo, Bulawayo (the property).

The background is that by agreement of sale prepared by an Estate Agent known as Hawu Properties and signed by the parties on 30 June 2017, the applicant sold to the respondent the property for a purchase price of $55 000-00 which was payable directly to the seller *via* mortgage finance within six weeks of the signing of that agreement. Although the respondent failed to pay the purchase price in terms of the agreement he was able to raise it subsequently

and the applicant appeared to waive the time limit when, on 25 August 2017, she signed a power of attorney appointing a conveyancer to transfer the property to the respondent. On the same date she also signed the Declaration by the seller in which she declared having sold the property to the respondent. By signing those documents she was facilitating the transfer of the property to the respondent.

Indeed the respondent took transfer of the property accordingly by Deed of Transfer Number 1318/2017 registered on 30 August 2017. At the same time mortgage bond number 1851/2017 was registered on the property presumably in favour of the financial institution which financed the purchase. Meanwhile, by letter dated 27 September 2017 written by the applicant's legal practitioners almost a month after the respondent had taken transfer of the property, the applicant purported to cancel the agreement of sale on the ground that the respondent had failed to pay the purchase price within the requisite period of six weeks from the date of signing the agreement. A classic case of closing the gate after the horse had bolted out, the sale having been consummated by the transfer of the property to the respondent on 30 August 2017.

As I have said, thereafter the applicant issued summons action in HC 3196/17 on 7 December 2017. The respondent filed an application in this court as well under HC 3274/17 on 15 December 2017 seeking a dismissal of the summons action by reason that it is frivolous or vexatious in light of the background I have outlined. Both those matters are yet to be determined by this court. Meanwhile the respondent instituted eviction proceedings in the magistrates court under case number MC8273/17 seeking to vindicate against the applicant who has remained in occupation despite ownership having passed to the respondent.

When the applicant entered appearance to defend the eviction the respondent was quick to file a summary judgment application. The applicant displayed a-never-say-die attitude when, unperturbed, she filed opposition. The magistrates court granted summary judgment in favour of the respondent concluding in its judgment of 23 February 2018 that the applicant has no defence to the vindicatory action. It is that judgment which the applicant has sought to impugn in the appeal noted in this case as HCA 14/18 on 23 February 2018. As I have said, pending all that, the applicant wants a final relief interdicting the execution of the eviction order.

The application is strongly opposed by the respondent on a number of grounds including that the application is improperly before this court which has no jurisdiction to entertain it because section 40 (3) of the Magistrates Court Act [Chapter 7:10] permits that court to grant a stay of execution. For that reason, the respondent reckons, the proper court to deal with the application is the magistrates court which retains the record of proceedings anywhere. Apart from that the respondent has raised the issue that the order sought by the applicant, which is not provisional but final in nature, is incompetent given that this is an urgent application brought in terms of rule 242 of this court's rules.

On the merits, the respondent stated that the applicant has failed to show an entitlement to the relief of an interdict because she simply does not have a right which could be protected by an interdict given that he is the registered owner of the property. As such he has a vindicatory right against whomsoever is in possession of the property.

Ms Mvundla for the respondent took two points *in limine* which I now proceed to examine. The first one is that the applicant cannot seek a final order by urgent application. She should have sought a provisional order instead with an attendant interim relief. *Ms Nunu* for the applicant submitted that there is nothing in the rules precluding an applicant in an urgent application from seeking a final order. I do not agree. In terms of rule 246 (2) in an application of this nature provisional relief is granted upon the establishment by the applicant of a *prima facie* case. It is a well-established practice of this court that in an urgent application the court grants interim relief and not substantive or final relief. It does so because the rules do not require an applicant to prove its case but merely a *prima facie* case. In that regard a practice has evolved wherein an urgent application is accompanied by a draft provisional order for the judge to consider granting interim relief. The substantive or final relief is then considered on the return date of the provisional order.

That procedure is not there just for the sake of it. It would be recalled that in terms of rule 244 where a chamber application is accompanied by a certificate of urgency issued by a legal practitioner certifying the matter as urgent, the registrar is required to immediately place it before a judge who is required to consider it forthwith. A judge is required to drop everything

and deal with the matter and a respondent served with such an application is also required to drop everything and come to court. In fact such a respondent is not even required by the rules to file any opposition as no time for such is given. Under those circumstances the judge cannot be expected to grant final relief but only interim relief. For that reason Form 29C, which is the provisional order, allows the respondent against whom a provisional order has been granted to file opposition to its confirmation within a prescribed period of time and to even anticipate the provisional order depending on the exigencies of the matter, in consultation with the applicant's legal practitioner and the registrar.

Although referring to a slightly different context, CHATIKOBO J had to state that point in *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 (H) at 193 A-B. He said:

> "The practice of seeking interim relief which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case."

I take the view that a litigant who approaches the court by urgent application must, as a matter of course, seek interim protection because of the manner in which such matters are handled. When such protection has been granted the rules allow the court to then deal with the matter in greater detail and with precision having the full benefit of submissions from both sides and to decide whether to grant the substantive relief or discharge the provisional order. It is undesirable for a litigant to come before a judge expecting final relief under such circumstances. If the matter calls for such relief to be granted it occurs to me that the litigant should approach the court urgently seeking a reduction of the *dies inducae* allowed by rule 237 on court applications before filing a court application in terms of rule 230. Of course the parties to an urgent application may consent to the judge granting final relief instead of a provisional order.

Having said that I must hasten to state that an application cannot be defeated merely on the basis of a defective draft order. The draft order is, after all, the wishful thinking of the applicant. It is for the judge or the court to grant the order and therefore he, she or it should be able to grant whatever order would have been proved in the application.

Ms *Mvundla*'s second point *in limine* relates to the jurisdiction of this court to decide an application for a stay of the execution of a judgment of the magistrates court. She submitted that because section 40 (3) of the Act empowers that court to grant such relief, it should be taken to have taken away the jurisdiction of this court to deal with such applications. Section on 40 (3) provides:

> "Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

Both counsel agreed that by virtue of that provision, an appeal does not suspend the judgment appealed against which can only be suspended or carried into execution by that court at the instance of the parties. Ms *Nunu* drew my attention to the judgment of GILLESPIE J in *Vengesai and Others* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 599A the import of which is that the common law rule of practice whereby the execution of a judgment is automatically suspended by the noting of an appeal does not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling statute. See also *Ritenote Printers (Pvt) Ltd and Another* v *Adam and Company (Pvt) Ltd* S-26-16 (as yet unreported).

It is true that the section confers upon the magistrates court the power to grant the remedy of a stay of execution. At the same time it does not oust the jurisdiction of the High Court, being a court of inherent jurisdiction as well as concurrent jurisdiction, to determine the matter. I therefore agree with *Ms Nunu* that the application cannot be defeated merely because the applicant had an option to seek the same relief in the lower court especially in circumstances such as the present where this court is seized with three other matters involving the same dispute between the same parties. In terms of section 176 of the Constitution this court has the inherent power to protect and regulate its own process and to develop the common law or the customary law. Given that it is seized with the appeal and other related matters, it cannot decline jurisdiction.

The inherent power of the High Court is that unwritten power which it is endowed with as a superior court. As stated by DUBE J in *Derdale Investments (Pvt) Ltd* v *Econet Wirelss (Pvt) Ltd and Others* 2014 (2) ZLR 662 (H) at 670E;

> "Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of the law and all procedural matters involving the administration of justice."

I associate myself fully with those remarks and should add that in terms of section 171 of the Constitution, in addition all other powers the High Court has, it has jurisdiction to supervise magistrates courts. It also has concurrent jurisdiction even where other inferior courts exercise jurisdiction. For that reason it cannot be seriously argued that the High Court has no jurisdiction to deal with the application. This court will not have jurisdiction only in circumstances where its jurisdiction is specifically ousted by statute. There is therefore no merit in that point *in limine* which is dismissed.

I turn now to deal with the merits of the matter. I have said that the applicant seeks the relief of an interdict. It means that, apart from all the other traditional requirements for the grant of an interdict like a well-grounded apprehension of irreparable injury, the absence of other ordinary remedy and a balance of convenience favouring the grant of an interdict, the applicant must first and foremost establish a right which should be protected by an interdict. See *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd and Others* 2000 (1) ZLR 1 (H) at 9 F-G; *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njanjai and Others* 2000 (1) ZLR 85 (S) at 89 E-H.

I am of the view that none of the essentials for the grant of an interdict are met in this application. For a start, the applicant does not show a right whether *prima facie* or otherwise. This is because we have this insurmountable situation in which the respondent is the registered owner of an immovable property. He holds title by a valid Deed of Transfer which has not been cancelled. For that reason the respondent has real rights of ownership signified by registration of title in terms of the Deeds Registries Act. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at

105 H, 106 A. The law protects the right of an owner to vindicate his or her property against anyone in possession of it. The only defence against the *actio rei vindicatio* is estoppel. In other words the applicant must show conduct on the part of the applicant amounting to a representation to her on which she acted to her prejudice. No such facts have been alleged. Quite to the contrary the applicant relies on a purported cancellation of a sale agreement which came *post facto* after transfer had long taken place, a transfer occasioned by her giving a power of attorney to a conveyancer to convey title to the respondent and signing a declaration to pass such transfer.

A right whether clear or *prima facie* cannot possibly exist to the applicant's favour because she now wants to renege after authorising transfer. In fact one can draw an analogy from the reasoning of the Supreme Court in *Twin Wire Agencies (Pvt) Ltd* v *CABS* 2005 (2) ZLR 34 (S) where a former owner of an immovable property had sought to resist eviction by a new owner who had taken title following a sale in execution on the basis that it was challenging the sale of its property. At 36D CHIDYAUSIKU CJ was emphatic;

> "In HC 3750/01, the appellant was seeking to prevent eviction on the basis that it was challenging the sale in execution. A challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property."

By the same deduction, the applicant may well be entitled to attempt a reversal of the transfer for whatever reason. However such an effort does not give rise to a right where the respondent remains the registered owner, which right may be protected by interdict. In addition, the horse having already bolted, the applicant may continue pursuing the remedies which she is pursuing but is not entitled to an interdict and the balance of convenience favours the registered owner. Therefore the significance of the noting of an appeal against the judgment of the lower court also pales. I conclude therefore that the applicant has not made out a case for the relief sought.

In the result, the application is hereby dismissed with costs

Ncube and Partners, applicant's legal practitioners
Mutuso, Taruvinga and Mhiribidi, respondent's legal practitioners