PERERA MAGARITA
versus
JOTINA MUNYUKI
and
DIRECTOR OF HOUSING, CITY OF MASVINGO
and
MESSENGER OF COURT, MASVINGO

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 June 2018 & 18 September 2018

Urgent chamber application

Adv W. Chinamora, for the applicant
Mr *F. Chirairo,* with him, Mr *J.G. Mpoperi,* for the first respondent
No appearance for the second and third respondents

MAFUSIRE J:

i/ *Introduction*

[1] Since December 2012 the applicant and the first respondent have been locked in legal combat over the right to occupy Stand 10648 Tafadzwa Muzvanya Street, Runyararo, Masvingo ("***the property***"). On 25 June 2018 the applicant filed an urgent chamber application against the first respondent to stop his eviction from the property pending the determination of his application for rescission of judgment that he had just filed some five days before. Despite fierce opposition by the first respondent I granted the application immediately after argument. The first respondent has now asked for my reasons in writing even though I had given them *ex tempore*.

[2] The applicant and the first respondent both claimed to be the legitimate and legal owners of the property. Both claimed to have bought and paid for it. Both claimed to have taken occupation immediately after purchase: the first respondent said in 2005, from the original owner, one Amon Mugabe, before his death, ("***Amon***" or "***the deceased***" or "***the original owner***") through her customary law husband, one McDonald Mangwarira ("***McDonald***"); and the applicant said in August 2012, from

the estate of the deceased, duly represented by one of his surviving sons, Godfrey Tafadzwa Mugabe ("***Godfrey***"), the executor dative to the estate.

ii/ *Background*

[3] The full background will help place the urgent chamber application in the proper context. It is this. On 21 December 2012 the applicant applied to the magistrate's court for *inter alia* the first respondent's eviction from the property. He alleged he was now the owner of the property, having duly purchased and paid for it in terms of a written agreement of sale between himself and Godfrey, following the grant of authority by the Master of the High Court for such sale.

[4] On 8 January 2013 the magistrate's court granted the order of eviction in default of appearance by the first respondent.

[5] On 27 January 2013 the first respondent applied to the same court for a combined order of rescission of the default judgment and for a stay of execution. She alleged she had been out of the country; that the application for eviction had not been served upon her and that she was entitled to occupation of the premises by virtue of her customary marriage to McDonald whom she said had bought the property from the original owner, Amon, the deceased, way back in 2005, and that the purported subsequent sale of the property to the applicant in 2012 by the deceased's estate, through Godfrey, the executor dative, was fraudulent and therefore a nullity.

[6] On 12 March 2013 the magistrate's court granted the rescission and stay of execution. Ever since then the parties have been haggling over whether the order was by consent or not by consent, the applicant saying it was by consent, and the respondent saying it was not by consent. But this particular wrangle had no bearing on the urgent chamber application.

[7] Upon granting the order of rescission and stay of execution the court referred to trial the applicant's original application for eviction, the one he had launched in December 2012. The other relief sought by the applicant in that application had been an interdict

to bar the second respondent herein, the City of Masvingo, from transferring ownership to the first respondent. Thus, both claims were referred to trial.

[8] The matter eventually came up for trial. It was not clear when. But the presiding magistrate ruled that she had no jurisdiction as the issue related to the ownership of the premises.

[9] On 1 July 2013 McDonald issued a summons out of the High Court at Harare claiming ownership of the property and the eviction of the applicant. On 18 November 2013 the applicant filed a plea opposing the claim. Nothing further happened in those proceedings until almost four years later when the applicant filed a chamber application, on 13 June 2017, for the dismissal of McDonald's claim for want of prosecution. McDonald's lawyer opposed the application. By the time of the urgent chamber application before me there had been no further developments in those proceedings.

[10] In August 2017 the first respondent filed with the magistrate's court, what she called an application for the restoration of possession of the premises. In essence, she alleged that following the grant of the default judgment for eviction on 8 January 2013 the applicant had proceeded to cause her eviction from the property; but that despite the rescission of that judgment on 12 March 2013, the applicant had remained in occupation, in defiance of the legal consequence of such rescission, which she said was the restoration of the status *quo ante*, and that as such, she was entitled at law to regain occupation.

[11] The applicant vigorously opposed the application. His grounds were multiple. One of them was that he had not taken occupation by virtue of the default order but that he had long been in occupation following his purchase of the premises way back in August 2012 and that in fact, the first respondent had not been in occupation, but had been staying in South Africa at all relevant times.

[12] The matter came up for determination on 18 September 2017. The presiding magistrate dismissed the application on the basis that what the first respondent was in essence seeking was an order for specific performance and that as such, by virtue of s 14(1)(*d*) of the Magistrates Court Act, *Cap 7:10*[1] it was not competent for a magistrate's court to grant such an order. The presiding magistrate also said the issue of ownership of the premises was pending at the High Court and that, in any event, another magistrate had previously ruled that the court had no jurisdiction. She also said there were numerous disputes of facts that were not capable of resolution on the papers.

[13] Dissatisfied with the ruling aforesaid, the first respondent, on 13 October 2017, filed an appeal to this court challenging all the findings by the magistrate's court. She sought an order setting aside that decision and restoring possession of the premises back to her, simultaneously with the applicant's eviction.

[14] The appeal came up for determination on 13 June 2018 before myself and my Brother Mawadze J. Both parties had, among other things, filed extensive heads of argument: the applicant through Mr *Chinamora*. When its turn came the matter was called up. However, there was no appearance for the applicant (who was the first respondent in the appeal). Mr *Chinamora* had just walked out of the court room after we had disposed of the preceding case in which he had appeared as one of the Counsel. Thinking that he had perhaps overlooked the fact that he was also Counsel in the matter given that the applicant's heads of argument had been settled by him, we asked that Mr *Chinamora* be called back into court.

[15] But when Mr *Chinamora* came back into court he assured us that he had made no mistake. He said whilst he had been briefed to settle the heads of argument for the applicant he had been given no further mandate to argue the appeal. On his part, Mr *Chirairo*, who was appearing for the first respondent, advised that one Mr *Maboke*

[1] Section 14(1)(*d*) of the Magistrate's Court Act says: "***No court shall have jurisdiction in or cognisance of any action or suit wherein … the specific performance of an act is sought without an alternative of payment of damages: Provided that a court shall have jurisdiction to order – (a) …*****[***not relevant***]*****; and (b) the delivery or transfer of property, movable or immovable, not exceeding such amount as may be prescribed in rules***; …"

was the applicant's legal practitioner of record and Mr *Chinamora's* instructing practitioner, and that Mr *Maboke* had been aware of the hearing on that date because the day before, he had had a conversation with him concerning the hearing of the matter on that date. Mr *Chirairo* said Mr Maboke had asked for a spare copy of the record of appeal because his own copy had been forwarded to Mr *Chinamora*. Mr *Chirairo* proceeded to move for a default judgment.

[16] After satisfying ourselves that there was on record the proof of service of the notice of set down of the appeal for that day, and following Mr *Chirairo's* submissions aforesaid, we duly granted an order in terms of the first respondent's draft. The order was as follows:

- The respondents being in default, the appeal be and is hereby upheld.
- The Court Application for Restoration of Possession issued by the Magistrate's Court on 18th August 2017 be and is hereby granted.
- That the 1st respondent and all those claiming occupation through him be and are hereby ordered to vacate Stand No. 10648 T Muzvanya Street, Runyararo, Masvingo within 48 hours of this court order.
- In the event that the 1st respondent and all those claiming occupation through him fail to vacate Stand No. 10648 T Muzvanya Street, Runyararo, Masvingo within 48 hours, the 3rd respondent [*i.e. the messenger of court*] be and is hereby ordered to evict the 1st respondent and all those claiming occupation through him and restore possession to the applicant.
- The 1st respondent is ordered to pay [the] costs of suit."

[17] Soon after uplifting the above order, the first respondent, in quick succession, wrote to the applicant to vacate the premises; sued out a warrant of ejectment from the magistrate's court and instructed the messenger of court to evict. The notice of eviction was served on 22 June 2018. But on 20 June 2018 the applicant had already filed the application for the rescission of the default judgment. He then filed the urgent chamber application on 25 June 2018.

iii/ *In limine*

[18] The first respondent took a point *in limine* that the application was not urgent. This was premised on two arguments. The first was that ever since the rescission by the magistrate's court on 12 March 2013 of the original default judgment granted on 8 January 2013 the clock had started to tick against the applicant who ought to have appreciated that he was at risk to be evicted from the premises but that he had neglected or failed to take any action then, or at any time thereafter.

[19] The other argument put forward by the first respondent that the matter was not urgent was that, in Mr *Chirairo's* own words, the applicant had failed 'to burn the midnight oil'. He said our order in default had been issued on 13 June 2018. The applicant had got to know about it the very same day after Mr *Chinamora* had briefed Mr *Maboke* about what had transpired at the court. But despite that, it was not until 25 June 2018 that the urgent chamber application had been filed. The delay had been inordinate. It had not been explained. Therefore, not having treated his matter as urgent, the applicant ought not be allowed to jump the queue. The case of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) was cited[2].

[20] I have in previous cases decried the practice by a growing number of legal practitioners of taking up spurious preliminary objections as if to do so is a mandatory ritual: see *Rufasha v Bindura University of Science Education & Ors* HMA 15-16 and *Dube v The Minister of Local Government, Public Works & National Housing NO & Ors* HMA 54-17. In the *Dube* case, I said, in Para [3], p 2:

> "It seems to me that to most lawyers, objections *in limine* are a fashionable industry and a mandatory ritual. The applicant's objection was frivolous. It was spurious. It was just meant to waste time."

[21] *In casu*, what triggered the urgent chamber application was plainly the warrant of ejectment that was issued on 21 June 2018 and served on 22 June 2018, in spite of the

[2] It is the *locus classicus* for the seminal statement that what constitutes urgency is not only the imminent arrival of the day of reckoning but that a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.

applicant's filing of the application for rescission of judgment on 20 June 2018. There was no such delay as to non-suit the applicant. Therefore, I dismissed the point *in limine*.

iv/ *On the merits*

[22] The applicant explained in both the application for rescission of judgment and the urgent chamber application why there was no appearance on his behalf at the appeal hearing on 13 June 2018. It had all been Mr *Maboke's* mistake. Both he and Mr *Maboke* explained by affidavit what that mistake was and how it had arisen.

[23] In a nutshell, the mistake was that upon receipt of the notice of set down for the appeal on 13 June 2018 Mr *Maboke* had diarised the date as 20 June 2108. Thus, to him the appeal would be heard on 20 June 2018. He had gone on to inform the applicant of the 20th June 2018 as the date of hearing. Although prior to that Mr *Chinamora* had been briefed to settle the applicant's heads of argument for the appeal, it had been decided to cut costs by getting Mr *Maboke* himself to argue the appeal. It was said the mistake had not been deliberate. It was one that a legal practitioner was wont to make from time to time owing to a busy schedule. Mr *Maboke* duly apologised for the mistake.

[24] But the first respondent and her Counsel would have none of it. Apart from the objection *in limine* that I have already dealt with above, the first respondent opposed both the urgent chamber application and the application for rescission of judgment on the ground that the rescission of judgment was doomed to fail because it had no prospects of success. It was argued that once the magistrate's court had on 12 March 2013 rescinded its earlier default judgment granted on 8 January 2013 it had become incumbent upon the applicant to vacate the property. He had neither appealed against the order of rescission of judgment nor brought it on review. Therefore, it was him, rather than the first respondent, who had to be out of the property as the parties did battle.

[25] It was also argued that whilst we had on 13 June 2018 allowed the first respondent's appeal only in default of appearance of the applicant, the substantive order that we had gone on to issue was the correct reflection of the legal position because the applicant had to move out of the property in all the circumstances.

[26] It was further argued that there could be no question Mr *Maboke* had been aware of the true date of hearing because the day before, there had been a conversation between him and Mr *Chirairo* over the appeal record as has already been discussed above.

[27] However, I was rather surprised by the intransigence of the first respondent and her Counsel. It appeared to me that the inevitable emotional standoff between the parties over the dispute was somewhat rubbing onto their legal practitioners who now seemed unable to maintain a dispassionate detachment from the case. I thought that matters had become rather personal. For example, having gone to the extent of briefing Counsel to settle the heads of argument for the appeal, I found no~~t~~ plausible logic in Mr *Maboke*, all of sudden. deciding to abandon the war and abscond. Mistakes do happen. Sometimes they cause a lot of inconveniences. Sometimes they are quite costly. Sometimes they are inexcusable. But not the one Mr *Maboke* made. It is quite common for people to diarise wrong dates for important events.

[28] The first respondent said there is a limit beyond which a litigant can escape the result of his attorney's lack of diligence. That may be so. But it is not always the case. It would be a sad day for justice if a simple mistake such as the one in question were to determine the fate of a case of such importance to the parties.

[29] The requirements for an interim interdict are:

- a *prima facie* right, even if it be open to some doubt;
- a well-grounded apprehension of irreparable harm if the relief is not granted;
- the balance of convenience;

- the prospects of success in the main matter;
- no other satisfactory remedy;

see *Setlogelo* v *Setlogelo* 1914 AD 221

[30] These requirements are considered conjunctively, not disjunctively. Some of them may assume greater importance in some cases than do others in other cases. Whilst a stay of execution is a species of an interdict, there is in my view a slight difference. In a broader sense, most orders of courts are interdicts: either prohibitory or mandatory. But in an application for a stay of execution the broad requirements for relief are **real and substantial justice**: see *Cohen v Cohen* 1979 (3) SA 420 (R); *Chibanda v King* 1983 (1) ZLR 116 (SC); *Mupini v Makoni*1993 (1) ZLR 80(S) and *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 (H). The premise on which a court may grant a stay of execution is the inherent power reposed in it to control its own process. In *Cohen's* case above GOLDIN J said at p 423B –C:

> "Execution is a process of the Court and the Court has an inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted **on the basis of real and substantial justice**. Thus, where injustice would otherwise be caused, the Court has the power and would, generally speaking, grant relief" (*my emphasis*).

[a] *Prima facie* right

[31] In the present case, there can be no question that the applicant had a *prima facie* right to occupy the property following his alleged purchase and occupation of it in 2012. Admittedly, that right was under serious challenge by the first respondent. But that was an argument for another day ~~by~~ **for** another court in another set of proceedings.

[b] Well-grounded apprehension of an irreparable harm

[32] Until he applied to stay execution, the messenger of court was set to go and evict the applicant from a house that he said he had occupied from August 2012. On 22 June 2018 the messenger of court had given him the mandatory forty-eight hours**' notice** to vacate or else face eviction. That he was still in occupation at the time of the hearing of the urgent chamber application was thanks to Mr *Chirairo's* magnanimity. He said

he had withheld final instructions to the messenger **of court** in deference to the court, once it had become seized with **the** urgent chamber application.

[c] Balance of convenience

[33] Perhaps the single most important consideration in this matter was the balance of convenience. This requirement enjoins the court to look at both sides. In a matter such as this, where the contesting parties are claiming the same rights over the same thing, whichever way a court rules, one party is bound to be prejudiced. Therefore, the court tries to weigh, objectively, where the greater or lesser prejudice lies. In the present case, the applicant consistently said in all his court processes that he had been in occupation since August 2012 when the brother of the executor dative had given him the right of occupation, albeit with a warning that there were tenants still in occupation. He said he did see those tenants. He talked to them. They agreed to start paying rent to him until September 2012 when he eventually moved in after they had left. He said the first respondent had been nowhere in sight until much later.

[34] Of course, the first respondent maintained that the applicant only took occupation after the default judgment by the magistrate's court on 8 January 2013. I did not have to decide this particular conflict conclusively. However, comparatively the applicant's version was *prima facie* the more credible. For example, by her own admission in the papers before the magistrate's court, she was either in South Africa or Harare at the material times. Furthermore, the applicant never had to execute the default judgment. This was because either the then occupants of the house had moved out, or the first respondent had applied for rescission and stay of execution. At any rate, nowhere in her papers did the first respondent categorically deal with the issue of the previous occupants of the property, whom the applicant called tenants, and whom he said paid him rent for a while. She merely denied that she was ever a tenant at the property.

[35] Thus, whichever way one looked at it, the balance of convenience, both in relation to the parties themselves, and to the court, favoured the status *quo ante* as existing since 2012 until the substantive dispute was determined, either in the appeal case that the

applicant sought to be reinstated by his application for rescission of judgment, or in the action by McDonald that was pending at the High Court at Harare.

[d] Prospects of success

[36] The lynchpin or fulcrum of the first respondent's argument was that there was no pint in rescinding our default judgment as the applicant's case was doomed to fail. She said once the magistrate's court had granted rescission of the default judgment on the basis of which the applicant had taken possession of the property, his continued occupation **thereafter** hung on nothing. It was therefore illegal. Reference was made to a passage in the book *The Civil Practice of the Magistrates' Courts in South Africa*, by authors **Jones and Buckle**, 6th ed. at p 119 on the effect of rescission:

> "**Effect of rescission**. A rescinded default judgment is a nullity and neither advantage nor disadvantage can flow therefrom; the petitioner is entitled to claim that the *status quo ante* the judgment be restored. An occupier who vacates after a writ is issued pursuant to a default judgment is therefore entitled to repossession on rescission."

[37] However, whether the first respondent was entitled to repossess the property was the very case sought to be determined on appeal. There can be no difficulty at all on the general principle as stated above. However, the one problem facing the first respondent herein was that it was by no means clear that the principle applied to her in the particular circumstances of the case. As already been said, the applicant maintained he did not gain occupation by virtue of the default judgment of the magistrate's court. He said he had already been in occupation way back. He said the reason why he sought the eviction of the first respondent**s in spite of he being in occupation** was because he wanted to silence her after she had started harassing him upon her return from South Africa. His application was for a twin order for i/ the eviction of the first respondent and ii/ an interdict to restrain the second respondent from transferring ownership to her. Whether these were competent orders or not are the issues set to be determined in the main dispute.

[e] No other satisfactory remedy

[38] In any given case, that there ~~is~~ **may be** no other satisfactory remedy is sometimes a question of degree. In the *Dube* case above I said money covers a multitude of sins. It is altogether difficult to imagine a wrong or harm or prejudice that may not be compensated by an award of money as damages. In some cases, money will be adequate. But in others, it may not be. It cannot buy everything. There are certain wrongs that no type of scale can measure**, or no amount of money may buy**.

[39] In the present case, the real dispute was in relation to the right of ownership of the property. *Prima facie* it was a double sale situation. One party was bound to lose the property. The task that awaited the court was to decide who it would be. The party that lost the property would potentially be entitled to damages from the seller. Therefore, from that angle, it could not be said there was no other remedy available to the applicant.

[40] However, the remedy that is envisaged by the law is not just any other remedy. It has to be one that is effective. What an effective remedy is can never be defined with any degree of precision. It has to be considered on a case by case basis. At any rate, and as already been pointed out, these individual requirement**s** for an in interdict are all taken together to help the court dispense **real and substantial justice** in the *Cohen v Cohen* sense.

[41] It was upon a consideration of the foregoing, namely that it had been the applicant in occupation of the property, and was still in occupation, that I granted the interim relief sought by the applicant. I gave an order in terms of the draft as follows:

Pending the return day of this application and any order given by the Court on that date, it is hereby ordered that:

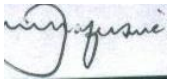
- The 3rd respondent or his lawful Deputy / Assistant be and is hereby ordered not to evict the applicant and those claiming through him from Stand 10648 T Muzvanya Street, Runyararo, Masvingo.

- The 1st respondent be ordered and directed not to interfere with the applicant's undisturbed and peaceful occupation of Stand 10648 T Muzvanya Street, Runyararo, Masvingo.

- In the event that that eviction has taken place before the determination of this urgent chamber application, the 3rd respondent be and is hereby ordered to restore the applicant and those claiming through him into occupation of Stand 10648 T Muzvanya Street, Runyararo, Masvingo.

- The costs of this application shall be in the cause.

18 September 2018



Ruvengo Maboke & Company, applicant's legal practitioners
Saratoga Makausi Law Chambers, first respondent's legal practitioners