

METHUSELI NYOKA

Versus

MLULEKI NCUBE

And

THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 24 & 30 JANUARY & 6 FEBRUARY 2020

Urgent Chamber Application

M. Mahaso, with T. Muganyi for the applicant

K. Ngwenya for the 1st respondent

No appearance for the 2nd respondent

KABASA J: This is an urgent chamber application for stay of execution. The applicant seeks to have his eviction from mining claims, known as Godwin N held under registration number 48981 and which extend into a certain piece of land in Umzingwane District, being a remainder of Bushy Park, Umzingwane District owned by one Freda Khumalo but being leased to the first respondent, stayed, pending the finalisation of an application for rescission of judgment.

The background to the matter is this. The applicant was granted mining rights by the Ministry of Mines and Mining Development in April 2019. The mining rights cover a block constituting of ten gold reef claims called Godwin N. The claims allegedly extend into a piece of land, being the remainder of Bushy Park in Umzingwane District. The land is owned by a Freda Khumalo who is leasing it to the first respondent.

On 5th August 2019 the first respondent issued summons under case number HC 1856/19 seeking the eviction of the applicant and six others from this piece of land. The summons were served on a E. Ncube who was said to be the applicant's employee and the Deputy Sheriff's return of service shows that this was done on 14th August 2019. The action was not defended

and as a result, on 12th September 2019 default judgment was granted against the applicant. The court order reads:

“It is ordered that:

1. 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants, and all those claiming occupation through them are evicted from a certain piece of land situate in the District of Umzingwane being a remainder of Bushy Park, Umzingwane District (commonly known as the remainder of Plot 10 Bushy Park, Esigodini, Umzingwane).”

A writ of ejectment was subsequently issued on 23rd October 2019. On 15th January 2020 the applicant was duly served with a copy of the writ of ejectment and notice of removal. This led to the filing of the urgent chamber application on 17th January 2020.

The application is opposed. In opposing it the first respondent raised points *in limine*. At the hearing of the application the parties addressed me on the points *in limine* as well as the merits.

Counsel for the first respondent argued that the application is improperly before the court. That being so because it is premised on an application for rescission which was filed out of time. The judgment sought to be rescinded was granted on 12th September 2019 and in terms of Order 9 Rule 63(1) of the High Court Rules 1971, the applicant was supposed to file the opposition for rescission “not later than one month after he has had knowledge of the judgment.” In terms of Rule 63(3)

“Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof.”

It is counsel’s argument that the applicant ought to have filed the application for rescission by 17th October 2019. The application was filed on 17th January 2020 without an application for condonation having been filed and granted. The application is therefore doomed to fail and the same fate befalls the urgent chamber application upon which it is premised.

Mr Mahaso for the applicant countered this argument and argued that the court is not seized with the merits or demerits of the application for rescission and should be concerned with whether the applicant has established a *prima facie* case to be entitled to the interim relief sought.

Counsel referred to MAFUSIRE J's decision in *Magarita v Munyuki and 2 others* HMA-44-18 in support of this proposition arguing that the court therein found that it was not seized with the application for rescission and proceeded to grant the interim relief after holding that the applicant had established a *prima facie* right. Whilst in the *Magaritha* case (*supra*) the urgent chamber application was also meant to stop the eviction of the applicant pending the determination of the applicant's application for rescission of judgment which he had filed five days before, there was no issue of such application for rescission having been filed out of time. The point *in limine* raised therein was that the matter was not urgent; a point the learned judge dismissed and proceeded to hear the matter on merit.

The learned judge considered the argument proffered by the first respondent's counsel in opposing the urgent chamber application and also made reference to the application for rescission of judgment which counsel had argued was doomed to fail because it had no prospects of success.

I do not intend to go into detail in looking at the *Magarita* case (*supra*) as I do not deem it necessary for purposes of the matter I am seized with. Suffice to say the learned judge dismissed the argument that the failure by counsel for the applicant to appear on the date of hearing due to a mis-diarisation of the date was supposed to be held against the applicant and therefore allow that to determine the fate of "a case of such importance to the parties." Nowhere in that judgment does the learned judge state that because he was not seized with the application for rescission the court would not consider counsel's submissions.

Turning to the facts *in casu*, the applicant filed the application for rescission on 17th January 2020, the same day the urgent chamber application for stay of execution was filed and just 2 days after the writ of ejectment and notice of removal was served. The applicant explained

in the founding affidavit that he only got to know of the judgment on the day he was served with the writ of ejection.

Whilst I am not seized with the application for rescission but this explanation addressed the failure to file the application for rescission within a month and equally addresses the presumption in Rule 63(3). Whether the judge who will hear the application for rescission will be satisfied that such explanation sufficiently discharges the onus on the applicant “to prove to the contrary” the deeming provision in Rule 63(3) is not, in my view, an issue this court has to determine for the purposes of the matter before me. What is clear however is that the applicant’s explanation successfully addresses the import of the point *in limine*. An application for condonation would only be necessary in the event that the judge seized with that application rules the applicant’s application as falling short of “proving to the contrary” the deeming provision in rule 63(3).

That said, I am not persuaded to hold that the application for rescission “is improperly before the court without an application for condonation having been filed.”

The point *in limine* therefore lacks merit and is dismissed.

Counsel for the first respondent had raised as points *in limine* the alleged failure by the applicant to prove the requirements for the granting of an interim relief for stay of execution. The nature of the points *in limine* was such that even in making their submissions, both counsel inevitably addressed the court on the merits. I will take a cue from them and proceed to look at the merits.

The requirements for an interim interdict are well settled. In *Magarita v Munyuki (supra)* MAFUSIRE J enumerated them thus;

“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 also *Enhanced Communication Network (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997(1) ZLR 342 (HC); *Setlogelo v Setlogelo* 1914 AD 221)

I also find the remarks by MAFUSIRE J in the *Magaritha* case (*supra*) instructive:-

“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. 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 *Mupini v Makoni* 1993 (1) ZLR 80 (SC), GUBBAY CJ had this to say:-

“Execution is a process of the court, and the court has an inherent power to control its own processes and procedures; subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution, or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where as *in casu*, the judgment is for ejection or the transfer of property for in such instances the carrying of it into operation could render the restoration of the original position difficult.”

With this in mind I turn now to consider the requirements to be met in an application of this nature.

1. *Prima facie* right, even if open to some doubt

The applicant’s contention is that he holds mining rights at Godwin N which extends into the land the first respondent seeks to evict him from. The claim is supported by a certificate of registration issued by the Ministry of Mines on 17th April 2019.

Whilst such certificate is not disputed, counsel for the first respondent argued that such certificate does not on the face of it show that these 10 claims extend into the first respondent's land and therefore bestow a right on the applicant to be within that land.

Mr Mahaso conceded that he could have obtained an affidavit from the Ministry of Mines to that effect. Counsel explained that efforts to secure the affidavit were frustrated by the Provincial Mining Director who directed counsel to Harare. Due to the urgency of the matter counsel opted to file the urgent chamber application without obtaining the confirmatory affidavit. Whilst it may be argued that the decision was unfortunate, sight should not be lost of the fact that this application is for a provisional order and the requirement is to prove a *prima facie* right, even though open to some doubt.

The only issue here is whether the certificate of registration which bestows ownership of a block consisting of the gold reef claims allows the applicant to be in that part of the first respondent's leased property. This is not an issue where a party is claiming entitlement without any documents to show for it. The applicant does have mining rights and the certificate of registration's authenticity has not been challenged. The location of the claims are indicated on the certificate of registration and all that was required was for the Provincial Mining Director to state that such "situation" as indicated on the certificate extends into the land in contention.

It is my considered view that this is evidence that will prove a "clear right" in an application for the confirmation of a provisional order. The phrase "even though open to some doubt" speaks to the very issue presented *in casu* where the first respondent is querying the location of the claims as depicted on the applicant's certificate of registration.

Counsel for the applicant had requested the court to grant a postponement and seek such confirmation which the Ministry of Mines would readily give upon such request by the court. I was not persuaded to grant the postponement for the simple reason that the application seeks a provisional order as opposed to a final order.

The *prima facie* right arises from the applicant's entitlement to mine on the 10 claims shown on the certificate of registration and although open to some doubt as to the exact location extending into the first respondent's leased property, the fact still is that such *prima facie* right has been established.

2. Apprehension of irreparable harm

The applicant filed this application in the face of an impending eviction. Filed with the application are "Bullion Purchase Statements" showing the gold sold to Fidelity Printers and Refinery on 27th May 2019, 4th June 2019, 8th June 2019, 1st August 2019 and 10th October 2019. Counsel for the first respondent argued that such statements do not necessarily show gold mined from the claims the applicant has at Godwin N. The applicant's contention is that infrastructure has been set up and employees engaged to work at the site.

It cannot be disputed that a forced eviction invariably comes with casualties. An evictee who voluntarily packs their belongings and evacuates from premises does so with some degree of care that does not necessarily extend to those who carry out evictions in compliance with a court order.

The applicant submitted in the founding affidavit that a hammer mill, illution plant, staff quarters, an office, a toilet and a perimeter fence have been set up at considerable expense. It is therefore not fanciful to entertain apprehension of irreparable harm.

As GUBBAY CJ stated in *Mupini v Makoni (supra)*

"Such special reasons against execution issuing can be more readily found where, as in casu, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult."

There is therefore real apprehension of irreparable harm should the eviction be carried out.

3. Balance of convenience

Whilst the applicant stated what prejudice he stands to suffer should the eviction take place, the first respondent does not state what harm will befall the leased premises should the eviction be stayed. This is not an issue where the parties are contesting the same mining rights. Where that is so, a party is entitled to fear substantial loss of the precious mineral, given that gold is a finite resource. The court has not been told of any interference with agricultural activities and the extent of such if there is such interference.

It is therefore not easy to say with certainty where the greater or lesser prejudice lies.

I am therefore inclined to hold that the balance of convenience favours the restoration of the status quo pending the finalisation of the main matter.

4. Prospects of success

The applicant seeks to vacate a judgment which was granted in default. Counsel argued that had the applicant been aware of the litigation he would have defended it as he is a holder of a valid registration certificate and so entitled to carry out mining activities.

It is a given that in any default judgment only one side is 'heard'. There is hardly any testing of the evidence as the other party's side of the story is not ventilated.

Whilst the Deputy Sheriff's return of service is *prima facie* proof that service was effected in the manner therein stated and that;

“The law is settled that in order to disprove the contents of a return of service prepared by the Sheriff, there is need for positive evidence to rebut the presumption of regularity of a return of service which is in the prescribed format” per CHIDYAUSIKU CJ in *TM Supermarkets (Private) Ltd v Avondale Holdings (Private) Ltd and Another* SC-37-17, it is equally important not to overlook the wide discretion the court has in applications for rescission of judgment.

In *Dewaras Farm (Pvt) Ltd and Others v ZIMBANK Ltd* 1998 (1) ZLR 368 (S) the Supreme Court had this to say:

“... good and sufficient cause is the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgence, even where there has been willful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default.”

I do not lose sight of the fact that the opposing affidavit avers that the applicant was aware of the summons and tried to engage the deponent over the eviction but the fact still stands that at the hearing of the application for rescission the applicant may very well succeed in persuading the court to exercise its wide discretion in the applicant’s favour and allow the applicant to be heard on the merits.

The issue is whether the applicant’s gold claims extend to the leased property and such an issue is easily resolved by reference to the locations as depicted on the certificate of registration. The Ministry of Mines official should therefore be able to put the matter to rest, allowing a resolution of the matter in a manner that accords with real and substantial justice.

It can therefore not be said the application for rescission of judgment is doomed to fail.

5. No other satisfactory remedy

The contention by the first respondent is that no irreparable harm which cannot be compensated by damages has been established. In other words should eviction go ahead and the applicant is vindicated in the main matter, whatever harm suffered as a result of the eviction can be compensated by an award of damages.

I can do no more than agree with MAFUSIRE J when he said:

“In any given case, that there 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.”

The impact of the eviction on the applicant’s mining activities, the effect it will have on the employees and their families, the possible damage to the machinery and the general disruption to the applicant’s business venture may not be easily quantified in terms of a monetary award.

Sometimes it is really the loss of an opportunity that matters, a loss that is not easily recoverable, if at all it can be recovered.

Ultimately as was stated in *Cohen v Cohen* 1979 (3) SA 420 (R);

“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.”

Whilst the facts in *Cohen v Cohen* (*supra*) are very different to the ones *in casu*, the overriding factor of ensuring real and substantial justice is achieved persuades me to grant the relief sought in *casu*.

Let the applicant be allowed to have his day in court, be heard, and a decision made. Execution can then follow or not depending on the outcome of the application for rescission.

In the result I make the following order:

1. Pending the finalisation of the application for rescission of judgment filed under HC 108/20, applicant’s eviction by 2nd respondent at the behest of the 1st respondent be and is hereby stayed.
2. Each party is to bear its own costs.

Tanaka Law Chambers, applicant's legal practitioners
T. J. Mabhikwa & Partners, 1st respondent's legal practitioners