

SIBAMBENE TRADERS ASSOCIATION

Versus

FINDLEY INVESTMENTS (PVT) LTD

And

MPUMELELO INVESTMENTS (PVT) LTD

And

THE SHERIFF OF ZIMBABWE

And

NHLANHLA DUBE

And

OLIVER MAPENZAUSWA

And

DROSILLA SIMELA

And

MORIA SIBANDA

And

THEMBI KHUMALO

And

HAPPINESS SIBANDA

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 20 AND 21 DECEMBER 2021 AND 20 JANUARY 2022

Urgent Chamber Application

N. Sithole, for the applicant

Mrs N. Mathumbu, for the 1st respondent

No appearance for the 2nd, 3rd, 5th and 6th respondents

4th, 7th, 8th and 9th respondents in person

NDLOVU J: This is an Urgent Chamber Application. It was lodged in this court on 15 December 2021 at 1143 hours.

The interim and final relief sought have been formulated as follows by the applicant.

THE INTERIM ORDER GRANTED

- (1) Pending the return date, the execution of the amended court order in the case undercover of case number HC 774/17 be and is hereby stayed with immediate effect.
- (2) 1st and 3rd respondents be and are hereby interdicted and prohibited from undertaking or continuing to undertake processes and procedures towards the full execution of the amended court order in HC 774/17.

TERMS OF THE FINAL ORDER SOUGHT

- (1) Pending the determination of applicant's application for rescission of the amended court order in HC 774/17, 1st and 3rd respondents be and are hereby interdicted and prohibited from commencing to execute, or executing or continuing to execute the amended court order on HC 774/17.
- (2) 1st respondent be and is hereby ordered to pay the costs of this application on an attorney and client scale.

SERVICE OF THE PROVISIONAL ORDER

- (1) The applicant's legal practitioners, assignees or agents be and is hereby authorised to effect service of application and provisional order on the respondents.

The application is opposed by the 1st respondent

BACKGROUND FACTS

On 17 February 2017 the 1st respondent undercover of case number HC 774/17 issued out summons out of this court against the 2nd respondent (a company in terms of the Zimbabwean laws) and 4th – 9th respondents. On 13 February 2019 the parties to HC 774/17 settled the issues between them by way of consent. Applicant, (a common law universitas) was not a party in HC 774/17. In November 2021 1st respondent sought and obtained an amendment of the court order it obtained by consent in HC 774/17 on 13 February 2019. Of relevance is that in that amended court order applicant became 2nd respondent's trade name.

This development sprung the applicant into action and undercover of case number HC 1951/21 filed an application for rescission of the amended court order in HC 774/17 in this court on 15 December 2021 at 0907 hours having become aware of the amended court order on 30 November 2021 when it was served with the writ of ejectment and warrant of ejectment by the 3rd respondent. Applicant's grievance is that 1st respondent's conduct amounted to fraud as applicant was never party to the proceedings in HC 774/17.

It is worthy noting that alive to the danger lurking in its vicinity as the clock had started ticking towards its imminent eviction, the applicant having filed its application for rescission quickly followed that with filing this Urgent Chamber Application for stay of execution, on the same day 2 hours and 36 minutes later, to be precise. On the same day, 15 December 2021, and at 1210 hours and 1215 hours the applicant's legal practitioners served on the 3rd respondent and the legal practitioners for the 1st respondent this Urgent Chamber Application respectively, among other respondents.

In the morning noon on 17 December 2021 a Friday, it was brought to my attention that my sister KABASAJ who was on duty could not hear this application for one reason or the other and I duly undertook to hear the parties on Monday 20 December 2021 at 1100 hours. Notices of Set Down were duly served on the parties that very day 17 December 2021 in particular the 1st respondent's legal practitioners at 1546 hours and the 3rd respondent at 1640 hours.

THE HEARING

The application could not be heard on Monday 20 December 2021 at 1100 hours due to the fact that 1st respondent's representative who was clothed with the authority to depose to

the opposition affidavit was coming from Harare and had failed to be in Bulawayo on time to swear to the opposition affidavit due to circumstances beyond his control. By consent the matter was postponed to 21 December 2021 at 1100 hours. The postponement was also to enable the parties to try to find each other and possibly settle out of court.

1st respondent filed its Notice of Opposition on Monday 20 December 2021 at 1423 hours in which an indication was made that this application for stay of execution had been overtaken by events. It appears for undisclosed reasons, the parties did not find each other between Monday 1100 hours and Tuesday 1100 hours.

At the hearing on Tuesday 21 December 2021 *Mr Sithole* for the applicant made the following submissions:

- (a) That the applicant and the 1st respondent are distinct bodies who are interrelated and interdependent through a Memorandum of Understanding.
- (b) As things stood then applicant has not been evicted from the premises in question.
- (c) The eviction had already started and was eminent and was due to be completed.

Mrs Mathumbu for the 1st respondent in her oral submissions reiterated that the application had been overtaken by events as the evictions had commenced and had been completed and the keys handed over to her client's representative. She submitted that some of applicant's members broke locks and returned into the premises. To that end she produced and tendered the return of service from Sheriff for Zimbabwe which bears the following remarks:

“Ejectment of defendants and all those claiming occupation through him were successfully executed. Ejectment done in the presence of Police Officers at (sic) Central Police Station Bulawayo escorting the Sheriff. Ejectment completed at 1051 hours. Keys handed over to Mathias Matenhabundo

The date action was taken is given as 17 December 2021.

Mr Sithole in answer submitted that some members belonging to the applicant have been evicted and locked out but others are still inside the premises with their wares going on to say that it is the 2nd respondent who has been evicted and not the applicant. He also told the

court that the area concerned is degenerating into a “war” zone. He implored the court to decide the matter on the papers filed of record and ignore the Sheriff’s Return of Service.

CONTEXTUALISATION OF THE FACTS

While aware of the Application for Rescission under case number HC 1951/21 and this Urgent Chamber Application and having been served with the Urgent Chamber Application the 3rd respondent proceeded with the execution 2 days later and the 1st respondent, while so aware of these two applications did nothing to stop the 3rd respondent from carrying out the evictions on 17 December 2021.

THE LAW

Mr Sithole has asked the court to ignore the Sheriff’s return of service and have said some of his client’s members are still within the premises in question.

MALABA DCJ (as he then was) had the following to say in *Nyamutata v Chikomo and 2 Others* SC 24-11.

“The rules of the High Court clearly provide that a Return of Service by the Deputy Sheriff is *prima facie* evidence of process having been effected on the person for whom it is intended.”

To ignore the Return of Service and its contents, as submitted by *Mr Sithole* will be to ignore relevant reality and unproductively perpetuate litigation, albeit it being tendered so late in the proceedings. I decline to ignore the Sheriff’s return of service and its contents. Based on the return of service by the Sheriff, probability leans towards *Mrs Mathumbu*’s submission that those applicant’s members who are said to be in the premises in question gained entry by breaking locks after the Sheriff had evicted them.

In *Ndlovu v The Officer Commanding Zimbabwe Republic Police – Bulawayo Province and Others* (HC 618/10) (2010) ZWBHC 100 (8 September 2010) CHEDA J remarked as follows:

“Generally all litigants are expected to await the finalisation of a matter before the court.” (my emphasis)

CHIWESHE JP (as he then was) had the following to say in *Anglican Church of The Province of Zimbabwe v Anglican Church for the Province of Central Africa and the Deputy Sheriff* HH 451-12.

“I must at this stage state that it is the practice, custom and tradition of this court that when an urgent matter has been set down, it suspends execution until the matter is heard.” (my emphasis)

DUBE-BANDA J took it further and stated as follows in *Livetouch Investments v Philcool Investments and Sheriff of The High Court of Zimbabwe* HB 173-20.

“I take the view that once the Sheriff has been served with an application for stay of execution while awaiting set down, must not proceed with execution.” (my emphasis)

I associate myself fully with the law as expressed by this court in the cases cited above. My view is that to do otherwise renders the hearing and determination of the application long after the proverbial horse has bolted, effectively academic. The conduct of both the 1st and 3rd respondents in this matter individually or collectively must be frowned upon. It is always the best way to handle litigation that it be finalised once and for all preferably on the merits as opposed to other means.

For all intents and purposes an order staying execution of an earlier court order is an interdict. The requirements for an interdict, interim and final apply. One of the requirements for a stay of execution order is the consideration of the balance of convenience as it relates to granting or not granting the order sought. The question that naturally arises now that the evictions have been carried out and the keys handed over to the 1st respondent is, does the balance of convenience favour restoring occupation to the applicant’s members?

I have in a measure avoided delving deeper into the contents of the papers filed and oral arguments made for the simple reason that the bulk of those tended to address the issue of rescission more than the stay of execution and I am deliberately avoiding unnecessarily commenting on those, lest I comment on a matter that is not before me. Having said that, the salient facts of this matter are that the individuals involved in 2nd respondent are also members of the applicant. It was submitted without a contradiction that applicant or its members were occupying the premises in issue through 2nd respondent who is the lease holder with the 1st respondent.

It is trite that a court must deal with a controversy that is live and not one that is moot.

“The position of the law is that if the dispute becomes academic by reason of changed circumstances the court’s jurisdiction ceases and the case becomes moot” per MALABA CJ in *Khuphe & Anor v Parliament of Zimbabwe and Others* CCZ 20/19. See also: *Zimbabwe School Examinations Council v Makomeka and Another* SC 10-20.

I am of the opinion that there is no longer a live controversy in this matter and the balance of convenience does not favour restoring occupation to members of applicant. Whether or not the applicant was claiming occupation through 2nd respondent whose eviction and all those who claim through it is not under any cloud of controversy.

COSTS

It is traditional that costs follow the cause. However that position is not cast on stone and each case must be dealt with on its peculiar circumstances alive of course to the general approach.

The conduct of 1st and 3rd respondents fell rather short of what one would expect from an officer of this court in the position of the 3rd respondent. Such conduct overloads this court with application after application especially in cases where the execution is say against property. Matters are better permanently finalised than their finalisation deferred. As for the 1st respondent, its conduct was akin to attempting to defeat the applications and unfairly pre-empt the court. This calls for censure.

DISPOSITION

It is therefore ordered as follows:

- (1) The application for stay of execution of the amended court order in the case undercover of case number HC 774/17 be and is hereby dismissed.
- (2) 1st respondent be and is hereby ordered to pay the costs of this application to the applicant on an attorney and client scale.

Ncube Attorneys, applicant’s legal practitioners
Messrs Moyo and Nyoni, 1st respondent’s legal practitioners