REPORTABLE (94)

RITA MARQUE MBATHA
v
(1) VINCENT NCUBE (2) MESSENGER OF COURT, HARARE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & KUDYA JA
HARARE, 6 JUNE 2022

Appellant in default

First respondent in person

E.T Moyo for the second respondent.

GWAUNZA DCJ

[1] This is an appeal against the entire judgement of the High Court sitting at Harare, handed down on 18 November 2021. The judgment dismissed with costs an urgent chamber application for an interdict restraining the first respondent from evicting the appellant, through the second respondent, from premises that she rented from the first respondent. At the hearing of the appeal, the appellant was in default, it being noted that according to the record before the court, she was aware of the date of set down of the appeal hearing. The appellant's name having been called out as mandated by the rules of this Court, and no response having been received, the Court in its discretion proceeded in terms of r 53(3) of the Supreme Court Rules, 2018, and determined the appeal on the merits. The appeal was dismissed with costs and reasons were to follow in due course. These are they.

FACTUAL BACKGROUND

[2] The appellant and the first respondent have been engaged in a long-running wrangle over the legality of the appellant's continued occupation of the first respondent's residential property. It is common cause that the duo were parties to a tenancy agreement. The first respondent being the owner of a residential property known as number 126 Edgemore Road, Park Meadowlands Hatfield, Harare (hereinafter, "the property") leased the property to the appellant for a five-year term from 2011 to 2016. The alleged subsequent renewal of the lease agreement is however, in dispute between the parties.

[3] Sometime in 2016, the first respondent approached the Magistrates' Court for an eviction order against the appellant due to an alleged accumulation of rental arrears (Case No. MC 39520/16). The order was granted in default after the non-appearance of the appellant. This became the genesis of the protracted legal proceedings that have traversed the entire panoply of the courts' hierarchy up to this Court. The appellant's application for rescission of the eviction order was dismissed by the Magistrates' Court after it noted that she had been in wilful default following proper service of process.

[4] Irked by this determination, the appellant filed an application for its review in the High Court under case no. HC 7542/17 on 16 August 2017. Faced with imminent eviction, the appellant also noted an urgent application for stay of execution under case no. HC 9296/17 pending finalisation of the aforementioned review application. The latter application was dismissed on its merits even though the High Court had made the finding that the matter was not urgent. Undeterred, the appellant lodged an appeal to

this Court against the verdict under case no. SC 847/17. When visited once again by the threat of imminent eviction from the property on 9 February 2018, the appellant together with her husband as the second applicant promptly filed an urgent chamber application before this Court for "stay of proceedings" pending the determination of their appeal.

[5] The application for stay of execution was dismissed in chambers by *MAKARAU JA* (as she then was) but the hearing of the appeal under SC 847/18 was expedited to the earliest possible date, being 17 May 2018. The appeal was subsequently allowed on the basis that the matter having been deemed not urgent, the court *a quo* ought not to have proceeded to determine the merits. Therefore, this Court substituted the decision of the court *a quo* with an order that removed the matter from the roll of urgent matters.

[6] However, prior to the finalisation of this matter on the ordinary roll, the parties were at loggerheads following a fresh attempt by the first respondent to eject the appellant from the property through the office of the second respondent on 7 August 2018. The second respondent had attached assets belonging to the appellant in order to satisfy costs of execution as per the writ of ejectment and attachment. The appellant alleged that the attachment of her property, its pending sale by auction the very next day, and her eviction from the property were 'illegal' because due process had not been followed. This culminated in spoliation proceedings being filed by her under case no. HC7310/18. The order granted by the High Court in that case mandated the restoration of the appellant's peaceful occupation and possession of the property. In addition, the second respondent was compelled to restore the appellant's assets which had been attached to satisfy the costs of execution. Upon obtaining the aforesaid relief, the

appellant proceeded to withdraw the application for review filed under HC7542/17. The withdrawal as explained by the appellant in her notice of withdrawal was premised on the understanding that the order granted in her favour under HC7310/18 purportedly finalised the disputes arising in both HC 7542/17 and MC39520/16.

[7] There was a brief lull in legal proceedings between the warring parties following the notice of withdrawal by the appellant. However, on 14 October 2021, the first respondent instructed the second respondent to eject the appellant and all those claiming occupation through her from the property on the strength of the ejectment order granted under MC 39520/16. The appellant was duly served with the notice of eviction.

PROCEEDINGS IN THE COURT *A QUO*

[8] In a manner consistent with the conduct observable in this matter, the appellant filed an urgent chamber application in the High Court for an interdict to halt the eviction proceedings commenced by the first respondent. She submitted that the ejectment proceedings were illegal as the order issued in HC 7310/18 had set aside the eviction order of the Magistrates 'Court which the first respondent relied upon. The appellant asserted that the first respondent had extended her lease agreement and that she was up to date on her rentals. She advanced her case by stating that one needed to merely prove that they were in peaceful and undisturbed possession of the property to obtain the stated relief.

[9] In addition, the appellant averred that she had established *a prima facie* right and that there was a threat of irreparable harm. She insisted that the balance of

convenience favoured the grant of the urgent application for an interdict. It was intimated that the respondents were conspirators in a scheme to unlawfully terminate her occupation of the rented property. The appellant submitted that she had no other remedy except to petition the court *a quo* on an urgent basis.

[10] The urgent chamber application was opposed by both respondents. The first respondent averred that the matter did not meet the requirements of urgency. He submitted that the appellant's lease agreement had not been renewed and that the appellant consistently defaulted on her rentals. The first respondent noted that the order under MC 35920/16 had not been set aside and thus it was improper for the appellant to seek an interdict against an extant order of the court. Additionally, it was contended that the appellant had failed to prosecute her review application against the Magistrates' Court order to finality. He averred that the order granted in her favour in HC 7310/18 dealt with an application for spoliation which had no bearing on the disputed ejectment order.

[11] The second respondent in opposition submitted that he was instructed by the first respondent on the basis that the order and writ in MC 35920/16 were still extant. He reaffirmed the first respondent's position that HC 7310/18 related to spoliation proceedings. The second respondent averred that a spoliation order did not operate to bar the subsequent execution of a lawful process. He submitted that the appellant conflated the relief of spoliation, interdict and stay of execution. The second respondent also refuted the allegations of connivance levelled against him by the appellant. He insisted that his actions were guided by the lawful process of the Magistrates' Court.

[12] At the hearing before the court *a quo*, the first respondent discarded his preliminary point regarding the lack of urgency in the matter in favour of a determination on the merits. Curiously, as noted by the court *a quo*, the appellant motivated five points *in limine*. She raised the exception *of res judicata* and submitted that HC 7310/18 decisively dealt with the question of her ownership and control of the rented property. The court *a quo* dismissed the preliminary point in favour of the first respondent's position that such a point could only be properly raised by a defendant or respondent to a suit. The appellant also raised several points *in limine* such as the dirty hands principle, contempt of court and allegations of criminal conduct which were all dismissed.

[13] On the merits, the court *a quo* determined that the eviction order under MC 39520/16 was extant as it had not been reviewed in light of the appellant's withdrawal of HC 7542/17 and that no appeal had been lodged against the eviction order. It also held that the spoliation proceedings under HC 7310/18 only related to the narrow issue of the possession of the property pending a determination of the substantive rights of the parties in parallel litigation under the application for review and stay of execution filed by the appellant. The court *a quo* asserted that the spoliatory relief awarded could not exist in perpetuity, with the result that there was no bar to the execution of the extant order under MC 39520/16. The court then dismissal the application.

[14] **ISSUES FOR DETERMINATION**

Aggrieved by the court *a quo's* determination, the appellant filed this appeal on a multiplicity of grounds which essentially raise the following issues for determination;

1. Whether or not the court order under MC 39520/16 remained extant following the High Court's determination under HC 7310/18.

2. Whether or not the appellant could interdict lawful conduct done in terms of the law.

[15] At the hearing of the appeal, as indicated earlier, the appellant was in default despite proper service on her, of the notice of set down. The first respondent appearing in person submitted that the dispute between the parties had been long drawn out. It was submitted that he would abide by the papers filed of record. In his turn, *Mr Moyo* for the second respondent submitted that contrary to the appellant's claims, the second respondent had acted upon instruction in terms of an extant court order. He dispelled the accusations that the second respondent had acted on an order that should not have been executed. Consequently, he prayed for a dismissal of the appeal with costs as prayed for.

[16] The court as earlier indicated, exercised its discretion in terms of section 53(3) of the Supreme Court Rules, 2018, and determined the matter on the basis of the respondents' submissions, and the papers filed of record.

WHETHER OR NOT THE COURT ORDER UNDER MC 39520/16 REMAINED EXTANT FOLLOWING THE HIGH COURT'S DETERMINATION UNDER HC 7310/18

[17] The appellant in her papers filed of record submits that the narrow issue is whether the eviction order by the Magistrates' Court is valid or not. She insists that no appeal was lodged against the judgment in HC 7310/18 by the first respondent and inexplicably relates this perceived default to the doctrine of pre-emption. She argues that the first respondent cannot be allowed to take up two inconsistent positions regarding the validity of the order granted in HC 7310/18. It is evident from the record

of proceedings that the appellant considers the spoliation order in that case as being dispositive of the protracted eviction dispute between the parties.

[18] To the contrary, the first respondent submits that the eviction order in MC 39520/16 remained extant following the withdrawal of the review application under HC 7542/17. It is submitted that the validity of the Magistrates' Court order was fittingly recognised by both the court *a quo* and this Court in the chamber application under SC 97/18. The second respondent is equally emphatic regarding the status of the order under MC 39520/16. It was extant. He submits that there was therefore no irregularity in his actions as the first respondent sought to enforce an order which was never set aside on appeal or review by a superior court.

[19] It is common cause that no appeal was filed by the appellant against the Magistrates' Court order. Nor could such appeal, in any case have been competently filed given that order was granted in default of the appellant's appearance. The court finds merit in *Mr Moyo's* submissions that an extant court order can only be competently set aside on appeal or through review. In **Herbstein & Van Winsen's** "*Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*" 5th ed, at page 1271, the following is advanced on the point:

> "**The reason for bringing proceedings under review or on appeal is usually the same, viz to have the judgment set aside**. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review." (*my emphasis*)

[20] The appellant, it seems, is of the mistaken belief that the order under HC 7310/18 definitively resolved the dispute concerning her eviction as well as other ancillary

issues between the parties regarding her occupation of the first respondent's property. The Court notes that the appellant as a self-actor may have failed to appreciate the import of the spoliation proceedings under HC 7310/18, in particular their effect on the extant eviction order granted by the Magistrates' Court against her.

[21] Reverting to the merits of the present appeal, it is manifest that the spoliation order in HC 7310/18 could not have been dispositive of the rights of the parties in or concerning the property in question. Spoliation proceedings are meant to uphold the rule of law by preventing litigants from resorting to self-help. Their purpose was considered in the case of *Anjin Investments (Private) Limited v The Minister of Mines and Mining Development & Ors* SC 39/20, where on pages 6 – 7 of the cyclostyled judgment, it was held as follows:

> "In the case of *Chesveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 240(H) REYNOLDS J at 250 A-D stated that:
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> > "It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing – that spoliatus ante omnia restituendusest (Beukes v Crous & Another 1975 (4) SA 215 (NC)). Lawfulness of possession does not enter into it. The purpose of the mandament van spolie is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo* ante to be restored until such time that a competent court of law assesses the relative merits of the claims of each party. Thus, it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all." (my emphasis)

From the cited cases, **the position of the law is quite clear in that an application for a spoliation order is not concerned with the legality or otherwise of the applicant's conduct.** The court would be called upon to determine whether one was in a peaceful and undisturbed possession and whether he was dispossessed unlawfully" (my emphasis)

[22] The above *dictum* is eminently apposite in the present matter. The proceedings in HC 7310/18 were merely aimed at restoring the appellant's peaceful and undisturbed possession of the property. There could be no feasible consideration of her rights or those of the first respondent as pronounced in MC 39520/16 because it was irrelevant to the disposition of the matter. The court *a quo* correctly noted that spoliation proceedings can be followed by further proceedings determining the rights of the parties to the disputed property. The remedy is aimed at ensuring that parties follow due process in asserting their rights.

[23] By parity of reasoning, the enforcement of an extant court order is one of the avenues through which parties uphold the rule of law. For the reasons set out above, the order in MC 39520/16 is still extant and could not be competently set aside under the spoliation proceedings in HC 7310/18. The order remains a lawful process that is enforceable in the absence of a review of its procedural propriety or an appeal that impugns its substance.

WHETHER OR NOT THE APPELLANT COULD INTERDICT LAWFUL CONDUCT DONE IN TERMS OF THE LAW.

[24] The appellant's heads of argument filed of record, offer little assistance in determining the singular question of whether the court *a quo* erred in dismissing the urgent chamber application for an interdict. Rather the appellant harps on the supposed failure of the court *a quo* to consider her points *in limine* despite her status as the *dominus litis* in the proceedings.

[25] *Per contra*, the first respondent submits that the appellant failed to establish a clear right to the property in dispute. He advances that an interdict is not a remedy

available against lawful conduct. It is submitted that in the absence of a lawful entitlement such as a binding lease agreement, the appellant could not be granted interdictory relief. Likewise, the second respondent asserts that the execution of a valid court order could not be interdicted by the court *a quo*.

[26] The position of this Court regarding the interdict of lawful process is well established. In the case of *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (C), on page 84 para F – G, *MALABA DCJ* (as he then was) illuminated the following:

> "An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to *a prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe it. **An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct**. *Airfield Investments (Pvt) Ltd v Minister of Lands& Ors 2004(1) ZLR 511(S); Stauffer Chemicals v Monsato Company 1988(1) SA 895; Rudolph & Anor v Commissioner for Inland Revenue & Ors 1994(3) SA 771 (W).*" (*my emphasis*)

[27] The point underscored in the above-referenced authorities, applies forcefully to the present matter. The court *a quo* could not grant the interdict as the respondents' actions were anchored on a valid court order obtained in the Magistrates Court. (See also *Magaya v Zimbabwe Gender Commission* SC 105/21). At any rate, the court *a quo* could not have granted the interdict sought by the appellant as she conflated the requirements for interdict and spoliation. In her founding affidavit in the court *a quo,* she avers that she is in peaceful and undisturbed possession of the property in question.

[28] The pleading of undisturbed possession is not a prerequisite to the granting of an interdict. It is relevant to spoliation proceedings. The case of *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* (Case No. 815/2016) [2021] ZASCA 81 provides the following clarification:

> "**Where the conduct complained of merely constitutes threatened deprivation of possession, the *mandament van spolie* is not available as a remedy because it is aimed at the actual loss of possession. The remedy for a mere threat of spoliation is a prohibitory interdict.** For a spoliation order there must be unlawful spoliation, ie a disturbance of possession without the consent and against the will of the possessor."

[29] In *casu*, the lack of pleadings to satisfy the requirements of an interim interdict served to weaken the appellant's establishment of a *prima facie* right that would have in appropriate circumstances justified the grant of a provisional interdictory order. See the authoritative case of *Setlogelo v Setlogelo* 1914 AD 231. The appellant, in short, failed to prove a case for the relief that she craved. Accordingly, the determination of the court *a quo* in refusing to grant the provisional order sought cannot be assailed.

[30] **COSTS**

The appellant contested the order of costs against her by the court *a quo*. She argued the court *a quo* ought to have furnished a proper explanation for the order of costs granted against her. On appeal, she sought costs to be granted in her favour. The first respondent submitted that the appeal ought to be dismissed with costs on a higher scale due to the appellant's penchant for incessant litigation. The second respondent also sought costs against the appellant due to the stream of applications that have kept the parties in court for several years.

[31] It is trite that in common law actions, costs generally follow the cause. Rule 15 of the Supreme Court Rules, 2018 allows the Court to make a special order as to costs that takes into account the conduct of the parties. However, in line with its discretion, the court considered the appellant's status as a self-actress and dismissed the appeal with costs on an ordinary scale.

[32] In the final result, the court found no merit in the appeal, hence its dismissal of it with costs.

MATHONSI JA: **I agree**

KUDYA JA: **I agree**

Scanlen & Holderness, second respondent's legal practitioners