MELUSI NDLOVU

Versus

P D S INVESTMENTS (PVT) LTD

And

THE MESSENGER OF COURT, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 AND 6 JANUARY 2011

N. Mazibuko for applicant
C Dube-Banda for 1st respondent

Urgent Chamber Application

MATHONSI J: This is an urgent application in which the applicant seeks an order for stay of execution of an eviction order granted by the magistrates' court sitting in Bulawayo pending appeal against that order as well as the hearing of an application for a declaratory order filed by the applicant and 3 other people in this court under case number HC 2157/10.

The background of the matter is that the applicant and the 1st respondent entered into a lease agreement on 1st December 2004 in terms of which the 1st respondent let out to the applicant a flat known as number 14 Bertha Court, Bulawayo. The said lease agreement expired on 31 December 2005 but the applicant remained in occupation as a statutory tenant in terms of the provisions of Rent Regulations Statutory Instrument 32/2007.

Somewhere along the line a dispute arose between the parties over payment of rent which led to the parties referring the matter to the Western Region Rent Board which fixed the rent and recurrent expenses payable by the applicant for the premises. Despite the fixation of the amount payable the applicant did not pay according to that arrangement as a result of which the 1st respondent approached the Rent Board and obtained a certificate of eviction which for some unclear reason has not been produced even as the applicant seeks to attack its validity.

Although the applicant argues that the certificate of eviction was effective from 31 July 2010, a point he strongly relies upon in attacking the proceedings in the magistrates' court, the certificate he has annexed to the application is that of Mr Chatora of flat number 1 Bertha

Court issued on 4 May 2010. Be that as it may, on the 10th June 2010 the 1st respondent instituted summons action in the magistrates' court seeking, *inter alia,* arrear rentals of US630,00, recurrent expenses of US$1 134,00 and the ejectment of the applicant from the premises.

As applicant had entered appearance to defend, the 1st respondent filed an application for summary judgment which the applicant again opposed. In that action 1st respondent alleged that the parties had not only agreed on monthly rent of $70,00 but had also reached an agreement before the rent board for applicant to pay recurrent expenses relating to rates, common lighting and the caretaker's wages, which presumably had been confirmed by the rent board. Alleging breach by failure to pay in terms of such agreement, 1st respondent sought an eviction order.

The applicant in his opposition denied the breach and went further to aver that even if an agreement was "reached before the rent board" it was not binding on him as "what is binding are the terms of the lease agreement" which had expired. The magistrate was not swayed by that argument and granted summary judgment. Although none of the parties has seen the wisdom of submitting the record of proceedings in that court or even the court order. Applicant does confirm in his founding affidavit in paragraph 7 that "judgment was entered in favour of the 1st respondent in terms of the draft order" which included arrear rent of US$630,00, recurrent expenses of US1 134,00 and eviction.

Aggrieved with that decision that applicant noted an appeal to this court prompting the 1st respondent to make an applicant for leave to execute the judgment pending appeal. The magistrate granted that leave on the 1st September 2010 and on the same day he filed an appeal against that order. It is not clear what the applicant did about that order as it was not until the 24th November 2010, almost 3 months later, that he launched an *ex parte* application in the magistrates' court seeking a stay of execution pending appeal and the hearing of a court application for a declaratory order he had filed in this court on 18 October 2010 under case number HC 2157/10.

That application did not find favour with the magistrate who took the view that having granted leave to execute pending appeal she was *functus officio.* It is only then that the applicant filed this urgent application for a stay of execution on the 25th November 2010, the same day that he was evicted. When the application was placed before me on 26th November 2010 it was not brought to my attention that the applicant had already been evicted and that the order he was seeking had already been overtaken by events, so to speak.

I could not grant the relief sought as I queried how the applicant had appealed against the court *a quo's* order for leave to execute pending appeal which was clearly interlocutory and therefore not subject to appeal. *South African Druggists Limited* v *Beecham Group PLC* 1987 (4) SA 876 (T) and *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (I) ZLR 36 (H). I was proceeding on vacation and the matter was then placed before another judge who, for some reason did not dispose of it until my return more than a month later.

Meanwhile, the applicant conceded in a letter dated 8 December 2010 that the appeal against the interlocutory order was ill advised but hoped to keep the application alive on the basis of the pending application for a declaratory order.

At the commencement of the hearing Mr *Dube-Banda* for the 1st respondent took some points *in limine* namely, that:

(a) The applicant could not appeal against the order for leave to execute pending appeal which is interlocutory in nature.
(b) As the same application was made without success in the court *a quo*, it was improper to bring it before this court. The remedy available to the applicant was to seek an appeal on review.
(c) There is an appeal pending before this court seeking the same relief.
(d) The applicant is aware that after his eviction on 25 November 2010, a new tenant moved into the premises and as such he should have joined that tenant by the name of Mandlenkosi Dube, in these proceedings; and
(e) There is no urgency in this matter and the applicant is not entitled to be heard on an urgent basis given that not only did he await the deadline before taking action but also that following his eviction, the matter has ceased to be urgent at all.

I do not think the first 3 points *in limine* have any merit at all. The issue of the appeal against the order for leave to execute pending appeal was abandoned by Mr M*azibuko* for the applicant who conceded that the appeal was ill-conceived. He, however, relies on the application for a declaratory order to seek a stay of execution.

The fact that the applicant tried his luck at the magistrates' court seeking the same relief does not oust his right to approach this court as the magistrate merely denied him audience but did not determine the matter. The same goes for the pending appeal as what is sought in this application is an interim relief pending the determination of the matter by this court.

It is the last 2 points *in limine* which I find meritable and I intend to treat them as one given their impact on the matter. The applicant is contesting the rent order issued by the Rent

Board in 2009 and the certificate of eviction presumably issued on 4 May 2010, if it was issued at the same time as that of Mr Chotora which has been produced. He has always been aware of these decisions but did not do anything about them. Even when the eviction order was granted he busied himself with other things until the eviction date came.

Indeed it was not until the date of eviction, the 25th November 2010 that he approached this court. In the result he was evicted and a new tenant took over the premises even before the matter was placed before me. What is also disturbing is that, despite the knowledge of these developments, the applicant did not disclose to the court that he had been evicted and a new tenant introduced until that was raised by counsel for the 1st respondent during submissions.

A litigant is not entitled as of right to have his matter heard urgently as a matter is only urgent is at the time it is instituted the risk of irreparable damage is so great that it cannot fproceed in the normal way – see *Musunga* v *Utete and Another* HH-90-03 at p 2-3.

Urgency which stems from a deliberate or careless abstention from action is not the kind of urgency contemplated by the rules. See *Ncube* v *Messenger of Court, Bulawayo N.O. and Another* HB-146-10; *Williams* v *Kroutz Investments (Pvt) Ltd and Others* HB-25-06 and *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 (H) where CHATIKOBO J stated at 193G:

> "What constitutes urgency is not only the imminent arrival of day of reckoning. A matter is 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."

In casu, the rent order whose validity the applicant is contesting has subsisted since 2009 and the certificate of eviction was issued on 4 May 2010. It was not until the day of eviction on 25 November 2010 that he filed this application. No explanation has been given for non-action except that on the face of it he appears to have taken the approach that he would only use his arguments as a weapon of defence against eviction and no more. This, in my view is self created urgency.

What is more, at the time the matter was placed before me, it was already *fait accompli* as the applicant had already been evicted. He did not join the new tenant as a party, which was a serious non-joinder. Neither did he disclose that fact. In an application of this nature the applicant is obligated to make full disclosure of all material facts that affect the granting or otherwise of an order *ex parte*. The applicant owes the court the utmost good faith. See

Grospeak Investments (Pvt) Ltd v *Delta Operation (Pvt) ltd and Another* 2001 (2) ZLR 551 at 555C-D where NDOU J stated that urgent applications characterized by material non-dislcosure, *mala fides* or dishonesty should be discouraged. See also *Van Den Berg* v *Beswick & Anor* HB-129-10.

In my view this application should fail by reason of non-urgency. In addition to that, to hold otherwise would now unravel further litigation involving the current tenant who moved into the premises in good faith. It is a cardinal principle of our law that there must be finality to litigation. See *Ndebele* v *Ncube* 1992 (1) ZLR 288 (5) at 290C.

Mr *Mazibuko*, for the applicant asked me to consider the injustice that has been suffered by the applicant as a result of what he views as a nullity in the form of an order made by the Rent Board directing him to pay "recurrent expenses" which, in his view, is beyond the power of the board given that in terms of the Rent Regulations, it can only make a rent order. He also strongly argued that the certificate of eviction was a nullity by reason that it did not comply with the rent regulations. For that reason he asked me to exercise my discretion in favour of the application to stop a glaring injustice. He relied strongly on the case of *Musara* v *Zinatha* 1992 (1) ZLR 9 (H).

I do not agree with counsel on that point because it does not appear *ex facie* that that rent order was a nullity nor that the certificate of eviction was invalid. Without making a pronouncement on that issue, the board has authority to make an order for rent and in doing so section 19(a) allows it to take into account "recurrent expenses". It made that order, whether right or wrong and if the applicant was aggrieved he should have proceeded in terms of section 35 of Statutory Instrument 32/07 to appeal to the Administrative Court. He could have elected to take the matter on review to this court in terms of section 26 of the High Court Act, Chapter 7.06.

Mr *Mazibuko* also strongly argued that the eviction order issued by the court *a quo* was also a nullity by reason that it was premised on an invalid certificate of eviction issued by the Rent Board. He relied on *Ngani* v *Mbanje & Anor* 1987(2) ZLR 111(S); *Fletcher* v *Three Edmunds (Pvt) Ltd* 1998(1) ZLR 257 (5) and *Heating Elements Engineering (Pvt) Ltd* v *Eastern & Southern African Trade & Development Bank* 2002(1) ZLR 351 (S).

I do not think those authorities have any bearing on this case. This is because when the 1st respondent instituted eviction proceedings in the court *a quo* he did not rely on the certificate of eviction issued by the rent board. Looking at the particulars of claim in that matter, the eviction claim was predicated on non-payment of rent. If proved it meant that the applicant had lost the protection accorded to him by section 30 of Statutory Instrument 32/07.

In simple terms by failing to pay rent he had lost all rights of a statutory tenant and therefore nothing turned on the certificate of eviction.

I am therefore unable to exercise my discretion in favour of the applicant to delve into the issues raised in the application for a declaratory order which is currently not before me. I will therefore determine the matter on the preliminary points raised and find that it does not pass the test of urgency.

In the result, the application is dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Dube-Banda, Nzarayapenga & Partners, 1st respondent's legal practitioners