RITA MARQUE MBATHA
and
IVYN GABRIEL MBATHA
versus
VINCENT NCUBE
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 18 & 19 October 2017

Urgent Chamber Application

Applicant in person
T.S Chinopfukutwa, for the respondent

MWAYERA J: The applicant approached the court through the urgent chamber book seeking stay of execution of an eviction order issued by the magistrate court. In specific terms the applicant sought:

TERMS OF THE FINAL ORDER

That you show cause why an order in the following terms should not be granted;

1. The eviction of the applicants be and is hereby stayed pending finalisation of the application for review filed with this Honourable court under case No. HC 7542/17
2. The second respondent be and is hereby barred from attaching any of the applicant's goods in respect of the writ under case No. MC 39520/16.
3. The writ issued by the first respondent under case No. MC 39520/16 be and is hereby declared unlawful and unenforceable.

INTERIM RELIEF

1. Pending confirmation or discharge of this provisional order, it is ordered that the eviction of the applicants is stayed pending finalisation of the matter.

Due regard of the written and oral submission as well as reference files was had. It is

apparent from the records that the respondent issued summons to evict the applicant and those claiming occupation of house No. 126 Edgemore Road Park Meadowlands Hatfield through the applicant. Summons were served by placing in a letter box. I must mention that the parties who were landlord and tenant were not first comers at court or to litigation on occasion of set down for trial. Summons for eviction process had previously been served on the applicant through the same process. In any event affixing or placing of documents or process is proper and satisfactory service in terms of the rules.

The applicant having been properly served with notice of set down did not attend court leading to a default judgment being granted. Pursuant to the default judgment the applicant sought rescission of the default judgment. The court held the applicant to have been in wilful default and hence confirmed the default judgment. The default judgment was not rescinded and hence a writ of execution for the eviction of the applicant was issued. The applicant applied for review of the magistrate court proceedings under HC 7542/17. A perusal of the review reference file outlines grounds of review as follows:

> "(a) the court *a quo* failed to afford the applicant a fair hearing as the court refused to postpone the matter to enable her to file a replying affidavit to the notice of opposition which was served to her by the respondent's legal practitioners together with the presiding officer in court on 25th of July, 2017 on the day of hearing.
>
> (b) the presiding officer in court *a quo* did not act rationally lawful in refusing the applicant the postponement.
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> (c) the opposing affidavit was not signed by the second respondent.
>
> (d) a gross procedural irregularity has occurred in the proceedings."

The grounds for review are all flowing from alleged denial of filing a replying affidavit. I must state that upon reading the record of the application for rescission together with the application for review it is apparent that the assertion on review, that, the applicant was not allowed to file a replying affidavit, is not a candid assertion at all. Clearly the magistrates court record of proceedings reveals the applicant did not wish to file any replying affidavit. The following except from the record is instructive.

> "Court …….(Do you need time to go through opposing papers and file answering affidavit?
>
> "Applicant: The court can proceed to determine the matter on papers filed by both parties I do not wish to file an answering affidavit."

What is deduced from the analysis of the records is that on the face of it there are no

prospects of success on review. This then impacts on the relief sought by the applicant for stay of execution pending review. In considering the requirements of urgency one of necessity has to consider not only that the part has acted swiftly but the cause of action and nature of relief sought. The requirements of urgency have to be cumulatively considered with the circumstances of the matter. See *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240. It would be absurd to seek to quickly act after harm has already been occasioned in circumstances where the applicant has no prospects of success In this case the applicant as a tenant having been issued with summons for eviction refrained from appearing for trial on set down date despite having been served. Further the applicant did not view it as necessary to file a replying affidavit to the opposition of the application for rescission of judgment. The applicant appears to have placed herself in the position that she now seeks on more than one occasion to redress on urgent basis.

What the applicant has presented before the court is that hardship will be occasioned by eviction but surely that does not clothe the application for stay of execution with urgency. The existence of an extant court order naturally entails execution for purposes of bringing litigation to finality. The applicant deliberately refrained from defending the summons for eviction and only when eviction was apparent did the applicant spring to action. The applicant sought in a duplicating manner to seek urgent redress of stay of execution. This conduct on the part of the applicant tainted the applicant's actions, thus revealing self-created urgency. See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188. The applicant under HC 7900/17 sought an interdict to stop the respondent from evicting them and from interfering with the applicant's stay at No 126 Edgemore Road Park Meadowlands, Hatfield. The matter was set down for hearing and before the determination the applicant approached the court in the present application seeking stay of eviction from the same premises by the respondents.

The conduct of the applicant does not clothe the application with urgency but boarders on abuse of court process. Approaching the court more than once to try and stop execution which is imminent does not make a matter urgent. The applicant appears to have waited till the day of reckoning and sought to seek redress on more than one occasion on the same facts involving same parties on urgent basis. The fact that the urgency is self-created militates against granting of the application. In any event there are no prospects of success on the pending review such that the balance of convenience does not favour granting of the application.

The application is accordingly dismissed with costs.

Kadzere, Hungwe & Mandevere, 1st respondent's legal practitioners