

SANDRA FELISTAS SHONIWA (in her capacity as Executrix Dative of the Estate Late  
Idah Tandiwe Mangaira)

versus

THE MESSENGER OF COURT, KWEKWE

and

SHEPHERD TUNDIYA

and

AVIM INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

**MAMBARA J**

HARARE; 16 and 20 January 2025

*Opposed Application*

*K. Tundu*, for the applicant

*K. Kachambwa*, for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

MAMBARA J:

**Factual Background**

This matter originates from an eviction order granted by the Magistrates' Court in Case No. KKGL668/20 concerning Stand No. 14, Charles Street, Newton, Kwekwe. The order directed the eviction of the second respondent, Shepherd Tundiya, and all those claiming occupation through him. This order was confirmed by the High Court and subsequently by the Supreme Court under Case No. SCB72/23, rendering it final and binding.

The eviction order issued by the Magistrates' Court explicitly stated:

1. That Shepherd Tundiya and all those claiming occupation through him shall vacate Stand No. 14, Charles Street, Newton, Kwekwe, within seven days of the order.
2. That failure to vacate shall result in forcible eviction by the Messenger of Court.
3. That the respondent(s) shall bear the costs of the application on a legal practitioner and client scale.

The second respondent's occupation was allegedly premised on a lease agreement between the applicant, Sandra Felistas Shoniwa, and the third respondent, Avim Investments (Pvt) Ltd. The applicant contests the authenticity of this agreement, citing fraud and fabrications. Following the Supreme Court's decision, the third respondent obtained an interim

interdict from the Kwekwe Magistrates' Court, staying execution of the eviction order. The applicant now seeks an order to compel the first respondent, the Messenger of Court, to execute the eviction order.

At the commencement of the hearing of this application, Mr *Kachambwa* representing the second and third respondents rose to raise two points in limine, viz; that the application was not competently before the court because there was no cause of action articulated by the applicant in the papers and that the matter was *lis pendens* since there is a matter before the Kwekwe Magistrates Court seeking to have the order in question stayed. I directed that the matter be heard on the merits and the points in limine should be addressed together with the rest of the submissions. Both counsels agreed to proceed as directed.

Additionally, a critical issue arose during the hearing concerning whether the mischaracterization of this application as not being a mandatory interdict is fatal to its prospects.

After hearing arguments, I dismissed the points in limine and the reasons thereof are comprehensively covered in this judgment.

### **Legal Issues**

This application raises the following issues:

1. Whether the Magistrates' Court has jurisdiction to stay the execution of an order confirmed by the Supreme Court.
2. Whether the first respondent's refusal to execute the eviction order is justified.
3. The legal standing of the third respondent in challenging the eviction order.
4. Whether the application meets the requirements for a mandatory interdict.
5. Whether the mischaracterization of the application as not being a mandatory interdict is fatal.
6. Whether the application discloses a valid cause of action.
7. The applicability of the doctrine of *lis pendens*.

### **Jurisdiction and Finality of the Supreme Court Order**

The Supreme Court is the apex court in Zimbabwe, and its decisions are final and binding on all lower courts. Once the Supreme Court dismissed the second respondent's appeal, the eviction order ceased to be under the jurisdiction of the Magistrates' Court. Section 171(1)(a) of the Constitution of Zimbabwe underscores the High Court's authority to prevent abuse of process and uphold judicial integrity.

The hierarchy of courts exists to ensure consistency and predictability. It is impermissible for a court of inferior jurisdiction to undermine a superior court's authority. Once an order is confirmed by the Supreme Court, its implementation cannot be delayed or obstructed by a lower court.

In *S v Molaudzi 2015 (2) SACR 341 (CC)*, the South African Constitutional Court emphasized:

“Finality in litigation is a cornerstone of judicial integrity and the rule of law. Allowing lower courts to interfere with superior court orders erodes public confidence in the judiciary.”

Thus, the application for the stay of the eviction order that is pending before the Kwekwe Magistrates court is of no moment at all. As if in sync with the findings of this court, the learned Magistrate who is seized with this matter issued an order deferring the consideration of this matter to this court. He correctly noted in his order that, “.. *it is best to suspend the decision on the interim order pending the finalization of the High Court application as it has a bearing on the issue before this court. Since there is application at the High Court can (sic) dispense with this matter once and for all, the following is granted; The rule nisi in this case is hereby extended pending the finalization of the High Court application HC 40876/24.*”

In essence there is nothing before the Kwekwe Magistrates court to consider as that court has no jurisdiction to interfere with an order of a superior court.

The first respondent's refusal to execute the eviction order undermines the authority of the judiciary. In *Harare West Rural Council v Sabawu, 1989 (1) ZLR 47 (H)* the court stated:

“A messenger of court is an extension of the judiciary and must act diligently in the execution of valid court orders. Any deviation from this duty amounts to misconduct and undermines the administration of justice.”

### **Standing of the 3rd Respondent**

The third respondent's claim is based on an alleged lease agreement that the applicant disputes as fraudulent. Evidence from police investigations (CR291/03/24) corroborates this allegation.

While in *Dynamos Football Club v ZIFA SC 93/2005*, the court recognized that:

“Non-parties may approach the court if their rights are directly affected. However, such claims must be bona fide and supported by credible evidence. Courts must be vigilant against frivolous claims intended to frustrate the implementation of valid orders.”

In this matter, before the Masvingo High Court, the issue of the involvement of the third respondent and the lease agreement was raised and it was dismissed on the basis that the third

respondent was not a party to the proceedings and further that as a corporate entity there was no way it would enter into a verbal agreement as a record of the lease agreement would be needed for tax and other purposes. After the appeal was dismissed by both the High court and the Supreme Court the third respondent then joined the second respondent in bringing an application for stay of the same eviction order in the Magistrates Court. This was clearly intended to frustrate the applicant and this court will not allow its eyes to be covered with wool. The third respondent's claim is not bona fide and credible. It must be dismissed with the contempt that it deserves.

### **Doctrine of *Lis Pendens***

The doctrine of *lis pendens* requires that pending proceedings involve the same parties, cause of action, and relief sought.

The doctrine of *lis pendens* cannot be invoked where the subject matter of the dispute differs fundamentally. Courts must guard against its misuse as a tool to delay justice.

In this matter the applicant has approached the court for an order compelling the Messenger of Court to execute the eviction order that it obtained in the magistrate's court and was confirmed by the Supreme Court. There is nothing regarding this order that is pending before the Kwekwe magistrates court. I therefore dismissed this point.

### **Requirements for a Mandatory Interdict**

The applicant seeks a mandatory interdict compelling the first respondent to execute the eviction order. The following requirements must be met:

- **A Clear Right:** The applicant's right to possession is established through the eviction order.
- **Irreparable Harm:** The applicant, according to its papers, has suffered financial losses exceeding USD 20,000 due to delays in execution.
- **Absence of Alternative Remedies:** The applicant has exhausted all other legal avenues, including appeals and engagement with law enforcement.

In *Setlogelo v Setlogelo 1914 AD 221*, the court articulated:

“A mandatory interdict is an extraordinary remedy that ensures compliance with clear legal obligations. It is granted where an applicant demonstrates a clear right, imminent harm, and the absence of an adequate alternative remedy.”

In this matter the applicant has satisfied all the requirements for the issuance of a mandatory interdict. It is baffling that the Messenger of court has failed to see that there is

nothing stopping him from executing the eviction order or he is simply dancing to the second and third respondents' tune.

### **Mischaracterization of the Application**

The applicant initially contended that this is not an application for a mandatory interdict. However, the relief sought—to compel the first respondent to execute the eviction order—aligns with the legal framework of a mandatory interdict. The substance of the relief sought, rather than its characterization, determines its legal nature. Mischaracterization does not invalidate an application where the legal basis is clear.

I dismissed this point also as the whole application speaks to a request for an order compelling the Messenger of Court to execute the eviction order, a mandatory order. The unfortunate mix up of words did not detract from the purpose of the application and the particular order sought.

### **Cause of Action**

The respondents argue that the application does not disclose a valid cause of action. In *Mukahlera v Clerk of Parliament 2005 (2) ZLR 365 (S)*, the court clarified:

“A cause of action comprises the facts necessary to establish a right to relief. Where an applicant demonstrates a clear entitlement and an act of omission that infringes on that entitlement, a valid cause of action exists.”

This point was further amplified by WATERMEYER J in *Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626 at 637* where he wrote that a cause of action in relation to a claim is “*the entire set of facts which gives rise to enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim.*”

Similarly, in *Patel v Controller of Customs v Guiffre 1971 (1) RLR 91 (G) 1971 (2) SA 81 at 84A* and *Read v Brown (1888) 22 QBD 131* defined the cause of action as being, “*every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court.*”

Again SMITH J, in *Dube v Banana 1988 (2) ZLR 92 (H) at 95*, observed that “*the cause of action means a combination of facts that are material for the plaintiff to prove in order to succeed in his action.*”

In this case, the applicant's entitlement arises from the eviction order confirmed by the Supreme Court, and the first respondent's refusal to act constitutes an infringement. Nothing could be as clear as this and it is foolhardy of the second and third respondents to claim that the applicant has failed to state his cause of action. This point too stands dismissed.

**Conclusion**

The interim interdict granted by the Magistrates' Court is invalid and unenforceable. The first respondent's refusal to execute the eviction order constitutes a dereliction of duty, while the actions of the second and third respondents amount to an abuse of court process. The application satisfies all legal requirements for a mandatory interdict and discloses a valid cause of action.

In the result, it is ordered as follows;

1. The first respondent, the Messenger of Court, is directed to execute the eviction order under Case No. KKGL668/20 within 24 hours of this judgment.
2. In the event of non-compliance by the first respondent, the Sheriff of the High Court is authorized to execute the eviction order.
3. The second and third respondents shall pay the costs of this application on a legal practitioner and client scale.

**MAMBARA J:** .....

*Manyangadze Law Practice*, applicant's legal practitioners  
*Kwande*, second and third respondents' legal practitioners