PATIENCE TADYANEHONDO
versus
ISABEL MASUKU
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI
HARARE, 2 November 2020 and 9 February 2022

Urgent Chamber Application

P Mutama, for the applicant
K Ncube, for the respondent

CHITAPI J: In case No. HC 3719/20 the first respondent obtained a default judgment per CHAREWA J against the applicant on 7 October 2020 in a claim for the ejectment of the first respondent and all those claiming through her from premises called G3 Mimosa Flats, South Road, Norton. The default judgment was applied for and granted on the basis that the applicant having been personally served with summons on 3 August, 2020 failed to enter appearance to defend. In consequence of such failure to enter appearance to defend, the applicant was barred from filing the appearance to defend or any other pleading in her defence, save for process to seek the upliftment of bar.

On 30 September, 2020 the first respondent filed an application for default judgment which was as already stated granted on 7 October 2020. The applicant on the same date that the default judgment was granted filed under case No. HC 5702/20 a chamber application for upliftment of bar. The respondent filed a notice of opposition and opposing affidavit to that application on the 19th October 2020. Upon filing the chamber application aforesaid and by letter of the same date, the applicant's legal practitioners addressed a letter to the respondents' legal practitioners wherein they requested that the respondents should remove from the roll the application for default judgment to allow for the determination of the application for upliftment of bar. The respondents' legal practitioners as is common cause obtained default judgment nonetheless. The respondent averred in the opposing affidavit that the chamber application for

upliftment of bar was filed after the application for default judgment had already been set down for hearing and that there was no engagement between legal practitioners on the need to stay the application for default judgment. Despite the polarized position on the issue, what is clear is that the respondent proceeded as she was entitled to obtain default judgment. She did so in the full knowledge that the applicant had commenced the process of applying for upliftment of bar.

Consequent on the obtaining of the default judgment, the respondents on 16 October 2020 caused the issue of a writ of ejectment of the applicant from the flat in issue. The applicant, however, stated in the founding affidavit that she acted to file this application after she became aware of the default judgment on 26 October 2020 and before the writ of ejectment was served. The above narration is the prelude to the filing of this urgent application for stay of execution of the writ of ejectment pending the filing and determination of an application for rescission of default judgment.

At the initial hearing of this application and having gone through the papers filed of record and engaging both counsel, they both agreed that the provisional relief sought was essentially similar to the final relief sought. Where the provisional and final relief are similar the arguments arise on the proprietary of the provisional order sought of necessity similar abound. This application is a good example because the applicant seeks a suspension of execution of a writ pending the determination of an application for rescission of default judgment. Such relief remains the same on the return date. The urgent application in character is therefore in such circumstance an application for final relief on an urgent basis. As a further example, spoliation orders are an example of urgent applications wherein the order sought is invariably final in nature.

I am aware of the decisions of MAFUSIRE J in *Brian Andrew Cawood* v *Elasto Madzingira & Anor* HMA 12/17 and of CHITAKUNYE J (as he then was) in *Ivy Rupande v Martin Grobler and 2 Ors* HH 2-19. It is suggested in those judgments that a litigant should seek for a final order through an urgent application. In the case of *ARTUZ* v *ZANU (PF)* HMA 36/2018 MAFUSIRE J, qualified his dicta in the Cawood case. The learned Judge, accepted that the circumstances of a case may be such that the interim and final relief are similar and that the rule that the final and interim relief should not be similar was not cast in stone (see para 29 of the judgment) where the learned judge stated:

> "*In casu* it is true that the interim relief sought on the original draft order was almost identical to the final order sought on the return day. In essence this relief was the interdict to restrain the respondents from continuing with the activities complained of. But my view is that the principle or requirement that the interim relief in any urgent chamber application should not be the same as the final relief to be sought on the return date is not cast in stone. Every case depends on its own facts. In appropriate situations it may be all that an applicant was concerned with yesterday, today and tomorrow. It if is granted today on in interim basis, all he may want on the return is its confirmation. All he shows in the interim among other things is an actual or perceived infringement of a *prima facie* sought, even if that right be open to some doubt. On the return date he must prove, on a balance of probabilities, an actual or perceived infringement of a clear right. It is not altogether uncommon for the court to grant interim relief, only to discharge it on the return day. Thus I find the 1st respondent's objection a moot point and lacking in merit."

A reading of r 246(2) of the old 1971 High Court rules now replicated as r 60(9)shows that its scope is limited to applications for a provisional order. The rule provides that in an urgent application for a provisional order, if the judge is satisfied that the papers establish a *prima facie* case, he shall grant a provisional order either in terms of the draft filed or as varied. There is nothing in the rules to suggest that a litigant may not seek an order which is final in nature on an urgent basis. The circumstances of each case as stated by MAFUSIRE J in the *ARTUZ case* (supra) determine how the case may be dealt with. What I think is crucial is to keep in mind that where the relief sought on an urgent basis is final in nature, then, the applicant will be required to prove his or her entitlement to the relief sought on the balance of probabilities. Where such is the case there would be no need for the order to be returnable for confirmation.

In casu, the applicant cast the relief sought in the provisional order as follows:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court if any, why a final order should not be made in the following terms:
>
> 1. Judgment granted under case Number HC 3719/20 be and is hereby stayed pending the determination of the application for rescission and upliftment of bar.
> 2. Costs shall be in the cause.
>
> INTERIM RELIEF
>
> IT IS HEREBY ORDERED THAT
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> Pending confirmation of the final order sought applicant is granted the following relief:
>
> 1. The 2nd respondent shall not eject applicant from G3 Mimosa Flats Norton pending the determination of the court application for rescission and chamber application for upliftment of bar."

It is evident that the provisional and final order sought are the same. The applicant intends to seek the rescission of the default judgment. Pending its determination the applicant seeks for an order suspending enforcement of the default judgment. It does not matter how the applicant expressed herself linguistically in drafting the two orders. They are similar in effect.

In casu, the parties agreed that the application should be argued on the basis of final relief. The respondent had filed a notice of opposition and opposing affidavit which was detailed. The applicant was granted leave to file an answering affidavit. The legal practitioners filed heads of argument within agreed time lines. I heard argument and reserved judgment after argument.

As would appear to be the norm in such applications the respondent raised points *in limine*. The points were that firstly, the application was not urgent. Secondly that the application was defective because the applicant served an incomplete application on the respondent in that it did not contain the draft provisional order. Thirdly and lastly, that the relief sought was incompetent in that the final and interim relief sought was similar.

Dealing with the last or third objection first, I have discussed at length the issue of the final and interim relief being final. This application is an example on the facts of an instance where there is really nothing to come back to court for as far as the final relief. It is ultimately up to the judge dealing with the urgent application to decide in the interests of justice how the application may be dealt with. An application where the final and interim relief sought cannot to be lawfully dismissed for want of form where circumstances show that to do so would deny the applicant relief which may properly be granted provided that the respondent will not suffer irreparable prejudice by being denied the set time for opposition given in the rules of court. The respondents did not allege any prejudice that their side stood to suffer if the application was determined on the basis of a final order.

It should also be pointed out that if the argument succeeds that the application is improperly before the court on account of the similarity of the final and interim relief, the application will not be dismissed because the fact that a party has filed a matter as a chamber application instead of as a court application is not a ground for dismissal of the application. The application may be struck off the roll or the judge deals with it in his or her discretion subject to regulating how the matter should be heard. *In casu*, I did not find that the objection

had merit and no prejudice would be suffered by the respondent if the application was determined as it stood.

The penultimate objection to the effect that the copy of the application which was served on the respondent had a missing document namely, the draft provisional order is one which did not appeal to me as *bona fide.* It is an example of a circumstance where a point *in limine* is taken for the sake of it. The respondent prayed that the application must fail on that basis. The applicant is indeed required to serve the copy of the application filed with the court. However, where there has been an omission to include a document, the judge would have to postpone the hearing to enable the applicant or the respondent as the case may be to provide complete documents to the party who raises the issue. The judge or court would favourably consider granting against the party who did not serve complete documents an order to pay wasted costs unless the omission is due to blameless inadvertence on the part of the party at fault. The objection therefore lacked merit.

The objection on urgency does not require any detailed analysis. It becomes academic to argue the point. This is so because once the parties agreed that they argue the application on the basis of a final order, then urgency as an objection was no longer an issue. In any event, on the circumstances of the case the application was urgent upon a consideration of the factors appropriate to consider in urgent applications where urgency is an issue. The applicant acted on the same day that the respondent obtained judgment by filing an application to uplift bar. At the same time the applicant alerted the respondent to that filed application as well as requesting the respondent to hold over the obtaining of an order for default judgment until the determination of the application to uplift bar. The respondent proceeded to obtain default judgment in the full knowledge that an application to uplift bar had been filed. The respondent also filed an opposing affidavit to the application to uplift bar on 19 October, 2020 yet the respondent had already obtained default judgment on 7 October, 2020. The notice of opposition dealt with the merits of the application. There was no need for this because once there was judgment granted, there ceased to be a bar in operation. The judgment could only be set aside by application for rescission of default judgment. The applicant averred that the respondent attached the court order of 7 October, 2020 in the notice of opposition. The applicant averred that she was at a funeral and only saw the default judgment order on 26 October, 2020 after it had been served on 22 October, 2020. She then filed this application on

28 October, 2020 to anticipate execution before a writ had been served upon her. I therefore, considered that the applicant acted with enough urgency as would be expected in the circumstances

In respect to the merits of the application, the applicant seeks a final interdict. The applicant must prove her entitlement to such relief on a balance of probabilities. The requirements for a final interdict are well known. They were set out by ZIYAMBI JA in the case *ZESA Staff Pension Fund v MushambadzI* SC 57/2002 on p 4 of the cyclostyled judgment where it is stated:

> "Secondly, the remedy sought by the respondent in the court a *quo* was an interdict. It is trite that the requirements for a final interdict are:
> 1. A clear right which must be established on a balance of probabilities
> 2. Irreparable injury actually committed or reasonably apprehended; and
> 3. Absence of a similar protection by any other remedy
> See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Flame Lily Investment Company (Private) Limited and Anor* 1980 ZLR 378; *Sanachem (Pvt) Ltd* v *Farmers Agricare (Pvt) Ltd* 1995 (2) SA 78A to 79B…"

In casu, the applicant established a clear right on a balance of probabilities. She is in occupation of the disputed flat by virtue of an arrangement with a third person, Judith Mpofu who is not the first respondent. The applicant questions the authority and *locus standi* of the applicant to seek the applicant's eviction. It is common cause that the property does not belong to any of the parties in terms of registered title. The first respondent had a written lease agreement between her and Zebagwe Housing Trust as lessor. The lease expired on 30 August, 2006. It was not renewed. The first respondent averred that she went to South Africa temporarily and left Judith Mpofu in charge of the flat. On the face of it, the first respondent sublet the flat to Judith Mpofu who in turn sublet the property to the applicant. Subletting amounts to a breach of the expired lease agreement. The first respondent claims that upon expiry of the lease agreement she become a statutory tenant. However she did not plead that she was compliant with the conditions of a statutory tenancy which is to pay rental by the seventh day of every month and to abide all conditions of the expired lease. A subletting would amount to a breach of the statutory tenancy and the first respondent would not be protected by statutory tenancy.

The first respondent did not cite either the flat owner or Judith Mpofu. The first respondent used Judith Mpofu as her agent. The principle that a tenant does not challenge the

lessor's title does not seem to apply in this circumstances of this case because the first respondent's tenancy was not established if one takes into account the expired lease the coming into the picture of Judith Mpofu and that of the applicant, all having occupied the property at one time or another. The applicant's clear right to challenge the eviction was amply established.

In respect of an irreparable injury committed or contemplated, it is clear that the applicant uses the flat as their dwelling. The first respondent did not allege in the declaration and the summons for eviction that she required the flat for her own use or occupation. She averred that she required possession of the flat because at law she is the one who should occupy it because Judith Mpofu whom she had an agreement with to stay in the flat had in turn entered into a lease agreement with the applicant for the occupation of the flat. From the facts therefore the applicant would suffer irreparable harm if she is evicted whilst the challenge to the default judgment was pending. She may as well withdraw the challenge if she is evicted as there would be nothing to fight for Judith Mpofu's affidavit does not explain how the applicant came to occupy the premises nor Judith Mpofu's role in the matter.

On the absence of similar protection by any other remedy none of the parties suggested that other remedy offering similar protection was available to the applicant. The first respondent averred that the applicant could sue for damages and apply for restoration of possession of the flat. On the contrary my view is that if any of the parties can recover damages, then it is the first respondent. It is a surprise that even in the main case, there was no claim for holding over damages. That claim is not made herein. I say that it is surprising because it is the norm for a person who claims eviction for unlawful occupation of his or her property to claim damages for every day of continued unlawful possession of the property illegally occupied by the illegal occupant. It does not make sense to allege that the applicant could always claim restoration of the property. The applicant would have moved on anyway and there would be no point to continue the fight for re-occupation.

In the event and upon a consideration of this matter on the balance of probabilities, I am satisfied on the facts and circumstances of this case that justice will be served if execution on the default judgment is suspended pending the determination of the application for rescission of default judgment. The applicant enjoys good prospects of success to obtain rescission of the default judgment upon a consideration of all facts and circumstances of this case.

In relation to costs, they are awarded based on the court's discretion. The conduct of

the first respondent to snatch at a judgment in the full knowledge that an application for upliftment of bar had been filed and was pending impacts on the first respondent's *bona fides*. It is clear that the first respondent's cause is not easily established on the papers. The first respondent's prayer for costs let alone on the higher scale is not justified. For her part the applicant prays for costs to be in the cause. The cause that is the rescission of judgment application had not been filed when I heard this application although a draft of the application was attached to the urgent application. I do not consider that I should make a costs order in favour of the applicant under those circumstances either because she still remains bound by the judgment of the court until the judgment is set aside.

The following order is made:

IT IS ORDERED THAT

1. The writ of execution and ejectment issued in case No HC 3719/20 is suspended pending the determination of an application for rescission of default judgment granted therein on 7 October, 2020.
2. The applicant if she has not already filed an application for rescission of the default judgment shall do so until serve a copy on the 1st respondent within 10 days of the granting of this order failing which this order shall be deemed lapsed.
3. Each party to bear its own costs.

Mabundu and Ndlovu, applicant's legal practitioners
Gill Godlonton and Gerrans, 1st respondent's legal practitioners