FARAI NDEMERA
versus
THE SHERIFF OF ZIMBABWE
and
EDINA MUKURAZHIZHA
and
THE REGISTRAR OF HIGH COURT
and
THE REGISTRAR OF SUPREME COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 March 2014 and 9 April 2014

Urgent chamber application

T. Dzvetero, for the applicant
J. Mambara, for the 2nd respondent
No appearance for the 1st, 3rd & 4th respondents

MANGOTA J: The applicant prayed the court to grant to him an interim relief of a spoliation order or that of an interdict, in the alternative.

The alternative relief which he prayed the court to grant him was overtaken by events and it could not, therefore, be considered.

In so far as the first relief is concerned, the applicant stated that he was in quiet, peaceful and undisturbed possession as well as occupation of stand number 419/420 Borrowdale Brooke Township, Harare until 26 March 2014 when, through the unlawful action of the respondents, the first respondent in particular, his occupation, possession and enjoyment of the property was disturbed by the first respondent who, pursuant to a court order of 13 March 2014, evicted his family members and him from the same.

The applicant, it is noted, has remained out of the property from which the first respondent evicted him from 26 to 31, March 2014.

He, in the premise, prayed the court to return him to the *status quo ante* pending the appeal which he filed with the Supreme Court on 26 March, 2014 against this court's order of 13 March, 2014.

The application which the applicant filed with the court on 27 March 2014 was termed "*Ex parte* urgent chamber application". He made it in terms of r 242 (2) of the rules

of this court. It cited the Sheriff of Zimbabwe, one Edina Mukurazhizha, the Registrar of the High Court and the Registrar of the Supreme Court as the first, second, third and fourth respondents respectively. The second respondent was brought into the equation as she was, and is, the foundation of the court order of 13 March, 2014 which the applicant is appealing against. The other respondents are court officials whom the applicant claims acted unlawfully when, through an orchestrated campaign to stifle his appeal process and to ensure his eviction from the property or through inadvertence on their part, he claimed, did not receive his appeal papers in time to save him from the agony of what he went through from 26 March, 2014 to Monday, 31 March 2014. His application is, therefore, mainly directed at the first, third and fourth respondents more than it is aimed at the second respondent.

Notwithstanding the fact that he desired to have the application heard on an ex-parte basis as, in the court's view, his way of showing the urgency of the matter, the court insisted that the application be served on all the respondents so that they have an opportunity to give their own side of the matter in the application which was before the court.

All the respondents were duly served with the application and, when the matter was to be heard at 11 am of Friday 28 March, 2014 all the respondents, but the second respondent, did not appear. None of the three respondents (first, third and fourth) appeared in person or through legal representation. None of the three submitted to the court his/her opposing papers. The court remained of the single view that the three respondents would, in the premise, abide by whatever decision the court would hand down in the matter.

The second respondent advised, through her legal representative, that she was opposing the application but she wanted time to prepare her opposing papers which she would file with the court before the end of business on 28 March, 2014. The parties and the court, therefore, agreed that the matter which related to the application be postponed to 2:30 pm of Monday, 31 March, 2014 for continuation of the same.

In the afternoon of Friday, 28 March 2014, however, the court remained alive to the apparently extremely urgent nature of the application which the applicant had placed before it and it, through the Judge's professional assistant, arranged that the parties re – appear before the court for continuation of the matter which, in the court's view, had to be resolved with the urgency that it appeared to deserve. It arranged that the parties do appear before it at 4:30 pm of the mentioned date during which time it believed that the second respondent's opposing papers could have been at hand.

The court remains extremely grateful to the Judge's professional assistant and to all the parties to the present application who were able to present themselves before the court at such short notice. The court, therefore re – convened at 4:30 pm of Friday 28 March, 2014.

When it did so, the first respondent handed in the report which he had prepared on the matter and so did the second respondent who handed in her opposing papers. The papers in question gave a graphic history of how the second respondent acquired title in the applicant's property which is the subject of the present application. The court was satisfied that her right and title to the property was, or is, unassailable although it is, in the applicant's view, this same acquisition which the applicant is contesting in some case, or cases, which are before this court. The contest in question caused the applicant to appeal against the eviction order of 13 March, 2014. The first respondent carried out the eviction on the basis of the court order of 13 March, 2014.

The applicant argued that the eviction was unlawful on the basis that the first respondent continued with the eviction when his attention had been drawn to the fact that the court order which he was then enforcing had been appealed against. During the Friday 4:30 pm hearing of the application, the court was confronted with a dispute of fact which could not be resolved on the papers. The dispute centred on the time which the first respondent received the applicant's appeal papers as measured against the time that the eviction process was concluded. The court and the parties agreed that the hearing remained postponed to the date and time which had originally been agreed upon to enable them to conduct an inquiry which was aimed at resolving that dispute of fact. The court relied on r 4 C of the rules of this court when it decided to go into the inquiry which was conducted and concluded on 31 March, 2014. The inquiry showed, in clear terms, that the first respondent became aware of the appeal which the applicant filed with the Supreme Court when the eviction which his personnel was conducting at the applicant's house was still in progress.

The report which the first respondent handed into court and distributed to the parties was prepared by him on Friday, 28 March, 2014. The report reads, in part, as follows:

> "The Sheriff's Office received Notice and Grounds of Appeal in terms of Rule 32 of the Supreme Court of Zimbabwe Rules and advised that at 12.29pm on the 26th of March and the additional Sheriff had already finished removing property from the house.
> It was the locksmith who was now in the process of changing the key".

In stating as he did, the first respondent was desirous of convincing the court that the applicant's appeal had been overtaken by events and, so it would appear, the appeal which

had been lodged with the Supreme Court could not be invoked to suspend an act which, in the first respondent's view, had been lawfully executed.

The court remains of the view that execution was not complete until all the processes which went into it had been dealt with to their final conclusion. The locksmith who was to change the keys to the house and possibly the gate which leads into the premises did not call at the property on his, or her, own accord. The first respondent hired him with a view to having the processes completed. He did so because if he left the gate and the house unlocked, the applicant would have had the easiest of tasks. He would simply have returned his household goods and his family into the house with little, if any, difficulty. On a proper interpretation of the word "execution", therefore, the locksmith was part of the Sheriff's team.

It follows, from the foregoing, that the first respondent's conduct which, all along, was lawful became unlawful when his attention was drawn to the fact that an appeal against the eviction order had been noted and he, that matter notwithstanding, allowed the locksmith who was part and parcel of his eviction team to change the keys to the house and the gate. It is this aspect of the first respondent's conduct which the applicant described as having been an unlawful one and the court agrees with the applicant in this mentioned regard. The unlawful aspect of that part is based on the accepted principle of law which is that an appeal properly noted suspends the operation of the judgement of the court *a quo*. There are a number of case law, and other, authorities which support the stated position. Amongst those authorities is the case of *Wood N.O.* v *Edward & Anor* 1966 ZLR 336 which the court has had an occasion to read as well as analyse to its total satisfaction.

It is on the basis of the above observed set of circumstances that it cannot be said that the applicant was not despoiled of his occupation of the property which is the subject of this application. He applied for the relief of *Mandamen Van Spoliae*. The requirements of that relief are simple and straight forward. They are that the possessor:

(a) was in peaceful and undisturbed possession of the property – and

(b) he had unlawfully been deprived of such possession.

He is, therefore, asserting that he must be restored to the *status quo ante* or the position in which he was before he was despoiled. The applicant's argument in this mentioned regard is unassailable.

The court, accordingly, grants him the interim relief which he sought in terms of the first alternative draft order.

Antonio & Dzvetero, applicant's legal practitioners
Messrs J. Mambara & Partners, 2nd respondent's legal practitioners