

RODGER SIBANDA

APPLICANT

AND

LOVESON GUMBO

1ST RESPONDENT

AND

THE MESSENGER OF COURT, BULAWAYO

2ND RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 OCTOBER 2010 AND 28 OCTOBER 2010

M. Ncube for applicant
G. Nyoni for 1st respondent

Urgent Chamber Application

MATHONSI J: The Applicant entered into a lease agreement with Karen Zakeyo, the first Respondent's wife, in January 2010 in terms of which he leased house No. 1 -3 Dublin Road Riverside, Bulawayo from the said Karen Zakeyo who is out of the country. At the conclusion of the lease agreement Karen Zakeyo was represented by her father one, Amos Zakeyo, by virtue of a power of attorney.

For sometime, the Applicant dealt with and paid rent to Amos Zakeyo but at a later stage the first Respondent returned to Zimbabwe from where he was and took over the responsibility of dealing with the Applicant. The house in question is registered in the sole name of Karen Zakeyo.

It is common cause that the first Respondent does not hold a power of attorney to act on behalf of his wife. However, on the 14th September 2010, the first Respondent issued

summons out of the magistrates' court in Bulawayo seeking an order for the eviction of the Applicant from that house for non-payment of rent.

The Applicant caused an appearance to defend to be entered and filed a plea. As the first Respondent took the view that the Applicant did not have a bona fide defence and that appearance had been entered for purposes of delay, he filed an application for summary judgment on 28 September 2010. That application was served on first Respondent on 30 September 2010 and was set down for hearing on 7 October 2010.

On that date the matter was argued before the magistrate who dismissed the Applicant's contention that the first Respondent lacked locus standi in judicio by reason that there was no privity of contract between him and the Applicant, the lease agreement having been entered into between the Applicant and first Respondent's wife. She curiously granted an order for the eviction of the Applicant, while referring the dispute over the alleged non-payment of rentals, to trial. In doing so, she reasoned as follows:

"It is therefore this court's consideration that the issue of arrear rentals be dealt with at a later stage affording defendant ample time to file his opposing papers. In the meantime defendant is evicted from the premises."

In terms of the summons filed in the magistrates' court the basis for seeking eviction was non-payment of rent and it is not easy to understand how summary judgment could be granted for eviction when the court accepted the existence of a triable issue on the payment of rent.

The Applicant has filed a court application for review of the proceedings in this court under case number HC 142/10 which matter is now pending. He has cited a number of grounds for review but the ones that I find compelling are:

- (a) gross irregularity in the proceedings on the basis of failure to comply with the rules of court.
- (b) gross irregularity in the proceedings on the basis of lack of locus standi in judicio on the part of the first Respondent who was plaintiff in the magistrates court.
- (c) gross irregularity in the decision in that, while accepting that there was a triable issue involving the alleged non-payment of rent, which was the sole reason for seeking eviction in the summons, the magistrate still found it fit to grant the eviction order.

The grounds upon which this court can review the proceedings and indeed the decision of the magistrate are set out in section 27(1) of the High Court Act, [Chapter 7:06] which provides:

“Subject to this Act, and any other law, the grounds on which any proceedings and decision may be brought on review before the High Court shall be-

- (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
- (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- (c) gross irregularity in the proceedings or the decision” (The underlining is mine).

Mr Ncube for the Applicant strongly argued that it was a gross irregularity for the matter to be set down on short notice thereby failing to accord the Applicant sufficient time to prepare his opposition. Order 15 Rule 1(2) of the Magistrates Court (Civil) Rules, 1980 provides:

“An application in terms of subrule(1) (i.e. summary judgment application), shall be made on not less than seven days’ notice delivered not more than seven days after the date of the defendants appearance to defend,.....”

In casu, the messenger of court's return of service shows that the Applicant was served on the 30th September 2010 which gave the Applicant virtually four days notice instead of the prescribed 7 days Order 15 Rule 1(2) is a peremptory provision by virtue of the use of the word "shall" in that Rule.

It admits of no discretion whatsoever and I do not agree with *Mr Nyoni* who appeared for the first Respondent that failure to comply with that Rule is an irregularity but not one that is gross as envisaged by section 27(1)(c) of the High Court Act. In my view failure to comply with a peremptory provision can only amount to a gross irregularity. To hold otherwise would make nonsense of that provision.

The first Respondent is not the registered owner of the rented premises. He was not a party to the lease agreement concluded between his wife and the Applicant. The claim that he filed was based on a lease agreement he was not privy to. In my view he did not have locus standi in iudicio to sue for the eviction of the Applicant in his own name. His marriage to Karen Zakeyo did not give him contractual or vindicatory rights of whatever nature.

See *Muswere v Makanza* HH 16/2005 (unreported). After all all marriages in this country are out of community of property.

There is also the issue of the decision to grant eviction while referring the dispute over rentals to trial. It's like the proverbial putting the cart ahead of the horse. Eviction could only be premised upon proof of non-payment of rent. Where the alleged non-payment had not been determined, there could be no eviction. *Mr Nyoni* sought to rely on the case of *Bridges and Hulme (Pvt) Ltd v Magistrate, Bulawayo and Another* 1996(1) ZLR 542 as authority for the

argument that the magistrate may have made a wrong conclusion of law but that is not reviewable.

I do not agree with that argument. In fact that case is authority to the proposition that a party is entitled to seek relief by way of review where the magistrates court refused to determine a matter it should have determined as in this case. The magistrate referred to trial the issue of non-payment of rent but granted eviction. This was a gross irregularity entitling the Applicant to approach this court by way of review.

I am therefore satisfied that Applicant has an arguable case on review. In the result, I make the following order, that:

- (1) the provisional order be and is hereby granted in terms of the amended draft order.
- (2) the interim relief being that the Respondents be and are hereby interdicted from evicting the Applicant from House No. 1-3 Dublin Road, Riverside Bulawayo pending the finalisation of the court application for review filed under case no. HC Civil Review 142/10.

Messrs Cheda and partners, applicant's legal practitioners
Messrs Moyo and Nyoni, 1st respondent's legal practitioners