

MATILDA NCUBE  
**versus**  
MBAITA MASEKA  
and  
DEPUTY SHERIFF, HWANGE DISTRICT

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 6 MARCH 2017 AND 9 MARCH 2017

**Urgent Chamber Application**

*N Ndlovu* for the applicant  
*K Ngwenya* for the respondent

**MATHONSI J:** The applicant has approached this court on a certificate of urgency issued by Queen Chimbo, a legal practitioner, seeking a stay of execution of an eviction order granted against her and in favour of the first respondent by the magistrates court of Victoria Falls.

Queen Chimbo certifies the matter as urgent because the applicant is about to be evicted from the property known as stand 2900 Chinotimba Township Victoria Falls in terms of a court order granting leave to execute pending appeal issued on 14 February 2017. If the applicant is evicted she will be rendered homeless during the rainy season. That is all that she says regarding urgency.

The background of the matter is that by letter dated 15 September 2015 the Municipality of Victoria Falls decided to offer the house, stand 2900 Chinotimba Township to the first respondent “on home ownership scheme” in its capacity as the owner of the property in question. By letter dated 14 October 2015 addressed to the local magistrate at Victoria Falls the Municipality stated:

“RE: OWNERSHIP OF PROPERTY NUMBER 2900 CHINOTIMBA TOWNSHIP

The above states subject refers. Please be advised that ownership of property number 2900 rests with Mrs Mbaita Maseka, I D No. 79-031315C-06. We have been advised that Matildah Ncube, ID No 79-026585T-79 acquired a peace order in relationship (*sic*) with

property number 2900. This was however an error by Ms Ncube as she has no claim over the property in question.

Yours faithfully

L Mumpande  
Director of Housing and Community Service.”

The right of ownership having been spelt out in no uncertain terms by the local authority and not having been challenged by anyone, in fact the declaration by the Municipality as to who owns the house, has never been contested to this present date, the first respondent issued summons out of the magistrates court of Victoria Falls on 17 February 2016 in case number GL116/16 against the occupants because she desired to take occupation herself with her sons.

The occupants, Nyarai Sibanda and Mpali Muleya opposed the action. However at the pretrial conference they were on bended knees when, conceding that the first respondent owned the house, they requested three months to secure alternative accommodation and then vacate. The matter was then resolved on the basis they would vacate by 16 May 2016. When that date came the present applicant surfaced with an *ex parte* application which was filed in that court on 23 May 2016 in which she sought a stay of execution “until this application is fully determined.”

In her statement in support of that application she stated that she feared being evicted along with the other occupants when she was not a party to the summons action because the eviction order was against the tenants and those claiming occupation through them. She stated further that she was in the process of appealing against the eviction order. That statement is remarkable by the fact that nowhere in it does the applicant allege any better rights over the property in question and the basis upon which she was entitled to appeal a ruling in which she is not a party. She does not even allude to any attempt at being joined as a party or having the judgment rescinded if it was granted in her absence.

The application was strongly opposed by the first respondent who even took the issue of lack of *locus standi in judicio* against the applicant. At the hearing of the application the applicant was in attendance. In her own words she stated:

“I was staying with some tenants and they were evicted. I never got any document that I should be evicted from the house. I do not know when I was supposed to vacate. So I have come to ask that I be given three (3) months to look for a place to stay.”

(The underlining is mine)

The magistrate ruled in respect of that application as follows:

“This is a ruling to an application for an interdict by the applicant. However a hearing was held and applicant indicates she requests three (3) months to vacate the house in question. I find her application for an interdict is therefore not genuine and this is the wrong application for applicant to make before this court. The application for an interdict is therefore dismissed.”

That ruling was handed down on 9 June 2016. It is the ruling which the applicant appealed against in HCA 49/16 which is yet to be determined. One of the grounds of appeal, there are six of them which are in the main repetitive, is that the magistrate erred in concluding that she had made a wrong application.

As I have already stated, the first respondent approached the magistrates court in Victoria Falls seeking leave to execute pending appeal which was granted by that court on 14 February 2017 in dramatic circumstances after the applicant’s legal practitioner did not attend court although the applicant herself was in attendance and was even invited to make submissions in opposition. In HC 495/17 the applicant has taken the court order granting leave to execute on review. The grounds for review as set out in that application are:

- “1) The trial magistrate erred by failing to take into cognizance that there was a procedural irregularity in terms of how the application in case No. GL 116/16 for execution pending appeal was set down.
- 2) The magistrate in the court *a quo* failed to observe applicant’s right to be represented by a legal practitioner of her choice.
- 3) The trial magistrate’s failure to recuse herself where there are reasonable grounds for any reasonable person to apprehend that the learned magistrate might be impartial bearing that she had previously adjudicated on three matters between the same parties with the regards (*sic*) to one and the same property.
- 4) It is also not clear how the learned magistrate exercised her discretion in granting the order for execution pending appeal as no valid reasons were given to substantiate her reasons for granting the order.”

I am aware that the review application is yet to be determined and that I am not sitting here to determine that application, but in my view, a review application has never been more bogus than this one. For a start, this is a person who, nearly 8 months ago was asking for three months to relocate upon a realization that she had no basis to contest the eviction. After the time to relocate was not given she then purported to appeal against the order dismissing her *ex parte*

application, an appeal that was as dishonest as it was devoid of any merit given her concession at the hearing.

Now when leave to execute pending appeal is granted simply because the so called appeal is completely without merit, she attacks the decision of the magistrate on an array of obtuse, if not incoherent, grounds which cannot possibly stand the test of any court of law. One may ask, how can a matter be said to have been irregularly set down when notice was given to the party concerned who was even able to attend the hearing? A matter is not irregularly set down because legal practitioners representing the parties discuss a date of set down and fail to agree on a mutually convenient date and when the matter is set down in terms of the rules the other one decides to stay away from court hoping to frustrate the hearing of the matter.

The constitutional right of a litigant to legal representation of his or her own choice can only be afforded to that litigant. Where the litigant decides not to exercise it, the court cannot be expected to secure legal representation for the litigant or to abandon its business of adjudication simply because a litigant has not brought a legal practitioner to court. It should be understood that when matters are set down for hearing courts of law have a duty to determine those matters impartially and without fear or favour. It is up to the litigant who wants to be legal represented to ensure that his or her legally representative fits in the program of the court and not the other way round. Quite often in contemporary history matters have been postponed again and again and in the process causing havoc to the court roll and piling up the backlog of pending cases because legal practitioners think they must dictate to the court when to hear matters.

Looking at the record, at no point before and during the hearing of the matter did the applicant seek the recusal of the presiding magistrate for any reason whatsoever? So on what basis would the presiding magistrate recuse herself from the matter? The applicant says recusal should have been made because the magistrate had previously adjudicated over other cases involving the same parties before. So what? That has never been a ground for recusal. While in an application for recusal the court is not concerned with actual bias but with whether an appearance of bias would be created in the mind of a reasonable person aware of the relevant facts, (see *S v Bailey* 1964 (4) SA 514 (C); *Masedza and Others v Magistrate, Rusape and Another* 1998 (1) ZLR 36(H)), in the present case bias has not even been alleged and there was not even an application for recusal.

An application for leave to execute pending appeal involves the exercise of discretion by the court. In doing so the court will determine what is just and equitable in all the circumstances. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 5454 CORBETT JA stated that the court should have regard to the following factors:

1. the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted;
2. the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute was refused.
3. the prospects of success on appeal, including the question of whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for other purposes like the harassment of the other party.
4. the balance of hardship or convenience on either party.

See also *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 155; *Zdeco (Pvt) Ltd v Commercial College* (1980) Ltd 1991 (2) ZLR 61 (H) at 63.

Where the person noting the appeal does so not with a *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court will allow the successful party to execute the judgment notwithstanding the absolute right of a litigant to appeal. See *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho* HH 39/07 (unreported).

It occurs to me that in the present case the appeal noted by the applicant has very dim prospects of success. It should be borne in mind that the appeal is against the decision of the lower court dismissing an application made by the applicant to interdict the execution of a court order granted in favour of a person who has been declared the owner of the house. The order for eviction remains in place. Why should a lawfully given court order not be executed? A person who is not a party in the proceedings for eviction has not sought to be joined in those proceedings neither has she sought to rescind the judgment granted in her absence electing instead to appeal. This is a person who appeared in court and, instead of justifying the application, she begged for three months to relocate. Now those three months have come and gone she now purports to appeal. It is an abuse of court process.

In my view the probability of such an appeal succeeding and indeed the subsequent review application succeeding is as good none existent.

In order for an applicant for a temporary interdict to succeed he or she must establish the requisites for the grant of such an interdict namely the existence of a *prima facie* right, even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted the absence of any other satisfactory remedy and the balance of convenience favouring the grant of an interdict. It is apparent from the discussion above that the applicant has dismally failed to establish the requirements for an interdict.

According the application is hereby dismissed with costs.

*Ndove, Museta and Partners*, applicant's legal practitioners  
*Dube and Company*, 1<sup>st</sup> respondent's legal practitioners