

FARISAI NANDO
and
RECSKILL INVESTMENTS (PVT) LTD
versus
PRIME INVESTMENTS (PVT) LTD
Represented by Godwills Masimirembwa
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 9 & 16 January 2015

Urgent chamber application

J. Zindi, for the applicant
T.R. Tanyanyiwa, for the first respondent
T. Hove, for the second respondent
No appearance for the third respondent

MAFUSIRE J: This was an urgent chamber application. *Ex tempore* I granted the following interim relief:

“Interim relief granted:

Pending the determination of this matter and the matter number MC 27477/14, the Applicant is granted the following relief:

- (i) That the 3rd Respondent be and is hereby interdicted upon service of this order from removing Applicant’s property from and/or ejecting Applicant and the minor children from the property known as 73 Orange Grove Drive, Highlands Harare.
- (ii) That the Applicant shall file her application for rescission of judgment in HC10241/14 by not later than close of business on Monday, 12 January 2015.”

The wording of the interim relief was an amendment to the original draft order by the applicant. Off-the-cuff I expunged certain words from that draft and added paragraph (ii). The original draft by the applicant, with the expunged words in bold, had read as follows:

“Interim relief granted:

Pending the determination of this matter and the matter number MC 27477/14, the Applicant is granted the following relief:

- (i) That the 3rd Respondent be and is hereby interdicted upon service of this order from removing Applicant's property from and/or ejecting Applicant and her minor children from the property known as 73 Orange Grove Drive, Highlands Harare, **and if 3rd Respondent has already ejected Applicant or removed her property, to unconditionally restore the same to Applicant and to permit her to reenter the aforesaid property with the 1st and 2nd Respondents meeting the costs, if any, of returning the same to the Applicant's at the property pending the finalization of this matter and the matter number MC 27477/14.**"

The wording of the order that I finally granted was slightly different from what I really intended to convey. During argument, Mrs *Zindi*, for the applicant, had indicated quite strongly that she had already prepared an application for rescission of the order of this court in HC 10241/14. She had said the only reason why she had not yet filed that application by the time of the hearing was pressure of work, all attention having been wholly focused on the urgent chamber application. So after I had decided to grant the applicant the substance of the relief that she sought, I wanted to put her on terms regarding her intended future litigation so that she would not sit on her laurels. I also wanted to ensure that the reference to "... *this matter* ...", upon which the life of the provisional order was predicated, would be a reference to the intended rescission application, and that the failure to file that application within the stipulated time would lead to an automatic lapse of the provisional order. Therefore, believing that the further changes to the wording that I would have to make to the interim relief would largely be cosmetic, I gave notice to the parties in accordance with subrule (2) of r 449 of Order 49 of the Rules of this Court to correct or vary the provisional order in terms of subrule (1)(b). The rule reads:

"449. Correction, variation and rescission of judgment and orders

- (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon application of any party affected, rescind or vary any judgment or order –
- (a)
- (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
- (c)
- (2) The court or judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

The actual wording of the interim relief that I intended to grant, and which I am now hereby granting, with the new amendments in bold, underlined and in italics; and with certain tautology struck off, reads as follows:

“Interim relief granted:

Pending the determination of ~~this~~ **the** matter **under HC10241/14 and HC 10698/14 and the matter number MC 27477/14, in the magistrates’ court,** the Applicant is **hereby** granted the following relief:

- (i) That the 3rd Respondent be and is hereby interdicted ~~upon service of this order~~ from removing Applicant’s property ~~from~~ and/or ejecting Applicant and her **three** minor children, **Nicole Masimirembwa (born 22 September 2003), Natalie Masimirembwa (born 30 September 2005) and Anotidaishe Masimirembwa (18 March 2008),** from the property known as 73 Orange Grove Drive, Highlands Harare.
- (ii) That the Applicant shall file her application for rescission of judgment in HC10241/14 **and/or HC 106981/14** by not later than close of business on Monday, 12 January 2015, **failing which this order shall automatically lapse.**”

And now to the actual case.

The urgent chamber application pitted the applicant on the one hand, and the first and second respondents on the other. The first respondent (hereafter referred to as “***Recskill***”) was a company. It was the registered owner of the property situate 73 Orange Grove Drive, Highlands, Harare, the subject-matter of the dispute (hereafter referred to as “***the property***”). The second respondent (hereafter referred to as “***Prime Ventures***”) was also a company. Its principal shareholder, principal officer and principal representative was one Godwills Masimirembwa, whom the applicant referred to as G.M. I shall also refer to him as G.M. But to the applicant there was no distinction between Prime Ventures and G.M. They were both one and the same person. In legal parlance, she was saying Prime Ventures was G.M.’s *alter ego*. Mrs Zindi, with much passion, urged me to lift Prime Venture’s corporate veil and see for myself what evil G.M. was perpetrating against the applicant. From the papers, it required little persuasion. So I did. I did not like what I “saw”. Here is it.

The applicant and G.M. had been husband and wife under an unregistered customary union. They had had three children together. They were all minors. The eldest was twelve years old, the second born ten, and the last seven. The customary union had been dissolved. Upon its dissolution, and in terms of an agreement penned by him or his legal practitioners, G.M., a lawyer by profession, had expressly and unequivocally undertaken that:

“The [applicant] and the minor children shall continue residing at 73 Orange Grove Drive, Highlands, Harare until such time as [G.M.] procures and purchases an alternative but similar property for them given that No. 73 Orange Grove is not owned by [G.M.]”

That was on 15 March 2013. But that is not what I saw and did not like. When I pierced the corporate veil and peered into Prime Ventures, what I saw and did not like was the fact that, contrary to his undertaking, G.M. was not only contesting vigorously the applicant’s application in the magistrate’s court to have the undertaking registered as an order of court, but also that he was literally abandoning the applicant and the children, leaving them at the mercy of Recskill and the Sheriff for Zimbabwe, the third respondent herein (hereafter referred to as “*the Sheriff*”).

On 30 December 2014 the Sheriff had served on the property a writ of ejectment. The subject of the writ was Prime Ventures, represented by G.M. “... *and all persons claiming rights and occupation through him* ...” But neither Prime Ventures nor G.M. “lived” at the property. It was the applicant and the minor children that did. The Sheriff would come back to evict on 6 December 2014. That obviously was a patent error. He must have meant 6 January 2015.

The background to that writ was somewhat convoluted. It was this. In May 2011 G.M., fronting Prime Ventures, had signed an agreement to buy all the shares in Recskill for US\$550 000. The amount would be paid between June 2011 and August 2011 in three tranches of US\$183 333 each. It seems G.M. did make some payments. But there was considerable dispute between the parties as to just how much he had paid. Applicant said by August 2011 G.M. had paid virtually the full purchase price, except for a paltry US\$13 333. Therefore, according to her, G.M. had in reality become the owner of the property. On the other hand, G.M. and Recskill maintained he had only paid US\$110 000. I will come back to this aspect later.

On the basis that G.M., or Prime Ventures, had breached the sale agreement, Recskill had taken out a summons in November 2014 under HC 10241/14. It had been served on the property. Naturally the applicant had picked it. She guessed or suspected G.M. would do nothing about it. Indeed it transpired that he had gone on to consent to judgment. Armed with G.M.’s consent, Recskill had filed a chamber application under HC10698/14 for a judgment

by consent. It had been granted on 11 December 2014. However, none of this was known to the applicant.

On 8 December 2014, through her lawyers, the applicant had written to Recskill's lawyers informing them of her interest in the property in terms of G.M.'s undertaking. She also advised of her intention to be joined to the action. Therefore, she enquired whether Recskill would oppose such an application.

There was no response to applicant's letter. On 19 December 2014 she had lodged her application for joinder. But the next development was the Sheriff serving the writ of ejectment. That was on 30 December 2014. Attached to that writ was the order of this court for ejectment. The applicant said she only saw that order for the first time on the day the writ was served. On 5 January 2015 she filed the urgent chamber application.

In the urgent chamber application, the applicant's case, in brief and in my own words as I understood it, was this. Recskill was far from being innocent. Its summons against Prime Ventures was a ruse. It was colluding with G.M. to get her and the children out of the property. The summons was based on falsehoods. It said G.M. had paid only US\$110 000 of the purchase price. That was a lie. Part of her evidence for saying that were two receipts or acknowledgements of payments by Recskill's representative, one Elson Toendepi ("**Elson**"). The one, signed by both G.M. and Elson on 1 July 2011, read:

"I ELSON TOENDEPI ... Received \$70 000 ... as part payment of the purchases price of shares in Recskill Investments which owns House No. 73 Orange Groove Highlands Harare. Another \$60 000 ... payable on the 8/07/2011. The balance of \$53 333 shall be spread over the remaining in two instalments of 30/07/2011 and 30/08/2011"

The other receipt, on 12 August 2011, read:

"I ELSON TOENDEPI ... Received \$40 000 as part payment of the share purchases price of shares in Recskill Investments which owns house."

The applicant collated the payments acknowledged in the two receipts and deduced that only US\$13 333 had remained outstanding.

At the hearing, Mr *Tanyanyiwa*, for Recskill took a point *in limine* that the application was not urgent. However, he soon abandoned it. He conceded that the applicant had taken action reasonably soon after she had become aware of the summons for eviction. She had applied for joinder.

Mr *Hove*, for Prime Ventures or G.M., also took points *in limine*. The first was that applicant lacked *locus standi* because she had no right of any sort to the property. However, he also soon abandoned that point, accepting that if applicant was saying that she had the right to stay on the property until G.M. had provided her with suitable alternative accommodation, and that G.M. and Recskill were in collusion against her, then she was entitled to be given a chance to establish her case.

Mr *Hove*'s second point *in limine* touched more on the merits. It was that the relief the applicant sought was incompetent in that the writ of eviction was in pursuance of a valid order of this court that the applicant had not challenged in any way. He argued that her joinder application had fallen away because, despite her filing it, this court had nonetheless proceeded to grant the order for eviction. In terms of Order 49 r 449 she could have applied for rescission of judgment straight away without having to be joined to the action. The rule was open to "... any party affected ...thereby ...". Mr *Hove* also said that whatever order the magistrate's court could give in the matter that was pending before it would not in the least have any bearing on the order of this court.

I dismissed Mr *Hove*'s second point *in limine*. Basically, and putting it bluntly, the applicant was saying that G.M. in the magistrate's court case was the same G.M. masking behind Prime Ventures in these proceedings. Recskill was linked to G.M. through collusion. She needed an opportunity to fight them both on neutral turf and in more elaborate proceedings. In such circumstances I found it inappropriate to shut the doors of court against her.

I was briefly concerned that the applicant, having become aware of the order of eviction on 30 December 2015, was still talking about wanting to file an application for rescission some eight days later, given the urgency of the matter to her. Furthermore, in the urgent chamber application there was no mention, or even a hint, that such an application was intended or being contemplated.

However, I was satisfied by Mrs *Zindi*'s explanation. The urgent chamber application had been filed on 5 January 2015. There had been no delay to talk of. All effort had previously been focused on it because of the real and imminent danger posed by the writ of eviction. The rescission application had since been drafted and was ready for lodging any moment.

I was also satisfied that the applicant could still proceed with her joinder application whereafter, if successful, she could still seek rescission under r 63. In answer to my query on that point Mr *Hove* was emphatic that the rules were clear. The applicant, as “... *the party affected ... thereby ...*” could straightaway seek rescission under r 449 without having to be joined to any proceedings first. I do not agree. The grounds for rescission under r 449 are different from those under r 63. Very briefly, under r 449 an applicant must show that he or she is the person affected by the order; that the order was erroneously sought or erroneously granted in his or her absence; or that the order has an ambiguity or a patent error or an omission in it; or that it was as a result of a mistake common to the parties. Under r 63 the applicant needs to show “*good and sufficient cause*”. But unlike r 449, the right to apply for rescission under r 63 is not extended to any party affected thereby. It is closed to the party against whom the judgment was given in default.

The significance of this, for the present matter, was that there was no basis for limiting the applicant’s right to rescission to r 449 only. If for some reason she might feel unable to satisfy the requirements of that rule there was no basis for denying her the chance to proceed under 63, especially given that she had already applied to be joined to the action in question.

On the merits, G.M. and Recskill said applicant was mistaken. The sums of \$70 000, \$60 000 and \$53 333 mentioned in the first receipt added up to \$183 333. That amount related to the first instalment. They said the reference in the first receipt to “[t]he balance of \$53 333 ...” was a reference to the balance on the first tranche, not of the entire purchase price. They said G.M. never got to pay anything other than the \$40 000 mentioned in the second receipt. Recskill summons for eviction against Prime Ventures mentioned \$110 000. It was that \$70 000 of the first receipt, and the \$40 000 of the second. So there had been no lie.

At the hearing Recskill produced some documents. One of them was titled Memorandum of Agreement of Refund. It was dated 23 December 2011. In it G.M. was admitting to have failed to pay for the property and was agreeing to be refunded his \$110 000.

G.M. substantively relied on the corporate personality of Prime Ventures to deny the applicant the relief she sought. He said her rights were personal against him. The agreement

of sale of the property had not been between himself in person, but between two companies. As such, applicant had no right to be involved, or to be interested in the property.

When I enquired what G.M. was doing to fulfil his undertaking to the applicant and the children, seeing that their eviction from the property was imminent, Mr *Hove* pointed to G.M.'s plea to the applicant's claim in the magistrate's court and expressly blamed her for the impending peril. In that plea, G.M. was vigorously opposing the applicant's efforts to have the agreement registered as an order of court. Incidentally, her claim in that court included custody, access, school fees, maintenance and other ancillaries. On the promise to provide the applicant and the children with accommodation at the property, or its equivalent, G.M.'s plea was that such clause must be varied as he no longer had the capacity to do so. Instead, he averred, the children had to be moved into cheaper government schools, and the applicant had to move to cheaper accommodation, i.e. of rentals of not more than \$800 per month. Incidentally, and by way of comparison, the rentals for the property, according to some lease agreement produced by Recskill, were US\$2 300 per month. Mr *Hove* said all the applicant needed do was to accept the \$800 per month, move into alternative accommodation and avert the eviction. But he could not say whether or not G.M. had already procured the alternative accommodation.

Recskill's position was that it was an innocent party. It should not be prejudiced by squabbles between ex-spouses. It denied it was in cahoots with G.M. Applicant had no right to cling to its property.

However, despite the stiff opposition, I granted the interim relief. There was something about Recskill's case and documents that did not quite add up. For example, it was said that the total sum of \$183 333 that the figures on the first receipt added up to, only related to the first tranche. But Elson was not saying that in that receipt. He was talking of a balance of \$53 333 to be spread over two instalments up to 30 August 2011. The agreement of sale said the entire purchase price would be paid by 31 August 2011. The receipt did not say the balance of \$53 333 was for the first instalment. According to the agreement the first tranche would be paid by June 2011. So, in my view, the \$183 333 in the first receipt was more likely for the last tranche than for the first. That was not all.

Recskill's case was that after Prime Ventures had breached the agreement of sale by failing to make any further payment, and that after that agreement had been cancelled, Prime Ventures had been given a lease over the property but that again it had breached that lease.

According to the second receipt, the \$40 000 that was said to have brought up the total payments to \$110 000, had been paid on 12 August 2011. Yet according to the memorandum of refund G.M. was getting back his full \$110 000 without any deductions for the arrear rentals. That did not make any business sense. That was not all.

In her letter to Recskill on 8 December 2014 aforesaid, applicant expressly advised Recskill that G.M. was not staying at the property but that she and the children were. She advised that G.M. was unlikely to defend the claim but that she intended to be joined to the suit and defend it. Most importantly, she sought an assurance from Recskill that it would not “*snatch a judgment*” as she awaited joinder. The letter was ignored. Mr *Tanyanyiwa* did not say why there had been no response. And sure enough Recskill had gone on to obtain a consent judgment.

There were other salient features that persuaded me that the applicant had established a *prima facie* case for an interim stay of execution pending the determination of her pending cases. For example, the lease that was pleaded in the summons was not consonant with the lease the applicant had stumbled upon and attached to her application.

The requisites for an interim interdict are a *prima facie* right, even if it be open to some doubt; a well-grounded apprehension of an irreparable harm if the relief is not granted; that the balance of convenience favours the granting of the interim interdict and that there is no other satisfactory remedy: see *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (1) ZLR 289 (SC) @ 391; *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) @ 398I – 399A); *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378 and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (HC) @ 238.

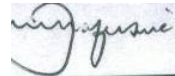
I was satisfied that the applicant had met all the requirements for an interdict. She and her children had a right to stay on the property until G.M. had provided her with alternative accommodation of similar value. Her fears that the Sheriff was coming back to evict her was real. Actually, it was what all the respondents, G.M. included, desired. On the balance of convenience, they weighed heavily in her favour. All I had to look at was her right vis-à-vis that of Recskill in relation to the property. Even if she was wrong in her accusations of collusion, which seemed unlikely from the evidence that she produced, nonetheless she stood to be thrown in the streets with her children and her property in this rainy season. On the

other hand, all Recskill stood to lose was simply more money in rentals. It had waited since 2011. It could wait some more. At any rate, such loss did not seem beyond recovery.

Lastly, for someone who is about to be evicted from the house that has been her only home for all the while, and who yearns for an opportunity to assert her right to that home, it becomes pedantic to talk about an alternative remedy to an interdict.

For these reasons I granted the interim relief.

16 January 2015



Mtewa & Nyambirai, applicant's legal practitioners

Manase & Manase, first respondent's legal practitioners

Musunga & Associates, second respondent's legal practitioners