JESCA MUKIWA
and
KETAH MUKIWA
versus
MENAS WUTA
and
SHERIFF OF ZIMBABWE
and
NGARAVA MHIRIBIDI & CHIKONO
and
ANNAH MUSONZA
and
ZODWA MUSONZA
and
MELVIN TAFADZWA MUKIWA
and
KNOWLEDGE MUMANYI
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, January 31 and February 6, 2018

Urgent Chamber Application

F M Katsande, for the 1st and 2nd applicants
R. Gasa, for the 1st respondent
S Chatsanga, for the 4th -7th respondents

CHITAKUNYE J. The applicants approached this court on a certificate of urgency seeking the stay of execution of a judgement granted by consent pending an application they made in terms of rule 449(1) (b) of the High Court rules 1971.

The order they seek is couched in the following terms:

INTERIM RELIEF

1. That pending the determination of the application in terms of Rule 449 of the Rules of the High Court 1971 a.a , in HC 9651/15 set down before MWAYERA J, the

enforcement of the Notice of seizure and Attachment dated 19 January 2018 in HC 9651/15 be and is hereby stayed.

2. That in the event that the 2nd respondent shall have ejected the applicants; it is hereby ordered that the applicants shall be reinstated in occupation of stand 15656 Sunningdale, Harare.

The final order is couched in these terms:

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. That the enforcement of Notice of seizure and Attachment in HC 9651/15 dated 19 January 2018be and is hereby stayed.
2. That the 1st respondent shall bear the costs of this application

The brief background to this application is that the applicants and some of the respondents have been embroiled in litigation since about 2012 over house number 15656-65 Close Sunningdale 2, Harare. On the 23rd November 2017 the dispute appeared to have been ended when the parties entered into a consent order. That order by consent was granted by MWAYERA J. That order included a clause that the applicants were to vacate the said immovable property on or before the 31st December 2017. It is pertinent to note that applicants were then represented by *Mr. Chikono* of Ngarava , Mhiribidi & Chikono Legal practitioners.

On the 31st December 2017 the applicants did not vacate the premises. This led to the first respondent obtaining a writ of ejectment against the applicants on the 5th January 2018. The first respondent duly instructed the second respondent to carry out the eviction. On the 19th January 2018 the 2nd respondent duly served the applicants with a Notice of Attachment and ejectment for the applicants and anyone claiming occupation through them to vacate and advising that if they fail to do so they will be ejected on the 24th January 2018.

It was as a consequence of this notice of ejectment that the applicants approached this court on a certificate of urgency.

On the first day of hearing the third respondent, Ngarava Mhiribidi & Chikono, was represented by *Mr. Chikono* who indicated that he did not know why the law firm was cited as a party when all that the law firm had done was to represent the applicants in HC 9651/15. The law firm had no interest whatsoever. The applicants' counsel could not justify the citation of the third respondent except to say that it was because they had represented applicants in HC

9651/15 and in his wisdom they had a lot to say in that case. He however conceded that for the current application third respondent could be excused hence on the subsequent hearings third respondent was not in attendance.

The first respondent opposed the application. *Ms Gasa* for the first respondent raised some points *in limine*. Counsel alleged that the application is pregnant with a lot of irregularities to such an extent that it was still born and applicant's counsel cannot breathe life into the application. She alluded to defects in the certificate of urgency and the lack of urgency.

On the certificate of urgency *Ms Gasa* argued that it is based on speculation and incorrect information and thus not a proper certificate as envisaged in rule 242(2) of the High Court Rules 1971.

As regards the urgency she alluded to the fact that this has been an ongoing dispute which was settled when the parties entered an order by consent on the 23rd November 2017 and so as from that date the applicants knew that they would vacate the premises by the 31st December 2017. From applicants' own words they got a copy of the consent order on 8th December 2017 clearly confirming what the parties were alleged to have agreed that applicants will vacate by the 31st December 2017. From this it was clear to the applicants that come the 31st December 2017 they should have vacated the premises. What befell them as a Notice of ejectment when they failed to vacate must have been clear to them; it was something they ought to have expected. If they had wished to contest the ejectment they could have done so soon after the consent order was granted or, at the latest, after the 8th December when they now had a copy of the consent order clearly stating that they should vacate by the 31st December 2017.

Mr Chatsanga for the fourth to seventh respondents indicated that he adopted first respondent's submissions as in his view the battle was really between applicants and first respondent

The applicants' counsel, on the other hand, contended that the matter is urgent as the need to act arose when the applicants where served with the notice of ejectment. Prior to that they had on 28th December 2017, filed an application in terms of rule 449 (1) (b) of the High Court Rules 1971 for the 'reappraisal of the merits' by the judge who had granted the order in HC 9651/15.

The pertinent paragraphs of the certificate of urgency which gave rise to the points *in limine* state as the reasons upon which the legal practitioners certified the matter as urgent as follows:

"1. The applicants filed an application in HC 9651/15 in terms of Rule 449 of the Rules of the High Court 1971 a. a. which is pending before the presiding Honourable Justice MWAYERA.

2 The 1st respondent has instructed the 2nd respondent to execute on the very judgement pending before MWAYERA J and doing so without first obtaining the leave of the judge.
3. If execution were to proceed in the circumstances not only has the 1st respondent taken the law into his own hands but the applicants will lose the lien they exercise over the property which endures while they are in possession.
4. Unless the relief sought is granted the applicants will suffer irreparable harm and forfeit the lien for services rendered for a period in excess of 12 years.
5. There is no alternative appropriate remedy available to the applicants."

These are the reasons *Ms Gasa* opined that given the circumstances of this case did not warrant this matter to be heard on the merits.

Upon hearing the parties I was inclined to agree with 1st respondent's counsel. My reasons thereof are as follows:

Rule 244 provides that:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (*b*) of sub rule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith."

The certificate must be prepared by a legal practitioner who must have applied his or her mind to the facts and circumstances of the case and reach his own view that the matter is urgent.

In *Chidawu & Ors* v *Sha and Ors* 2013(1) ZLR p 260,at 264 C-F GOWORA JA, after quoting rule 244, stated that:

> "It follows that the certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn the judge is required to consider the papers forthwith and has the discretion to hear the matter if he or she forms the opinion that the matter is urgent.
> In making a decision as to the urgency of the chamber application, the judge is guided by the statements in the certificate by the legal practitioner as to its urgency. In this exercise, the court is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant.
>
> In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his/her client says regarding perceived urgency and put it in the certificate of urgency".

The learned judge continued at 265 B – C:

> "…… in order for a certificate of urgency to pass the test of validity, it must be clear *ex-facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute."

At p 266 D the learned judge continued:

> "The belief that a matter is urgent must be a matter of substance rather than form. The genuineness of the belief postulated in the certificate must be tested by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard."

For the certificate of urgency to pass the above test it must surely be based on facts that are credible. Where the factual basis is incorrect or speculative then the certificate is not likely to be of any use to the judge.

In casu, as aptly noted by *Ms Gasa,* the certificate was premised on the assertion that the application in terms of rule 449 was pending before MWAYERA J. see paragraph1. In paragraph 2 the legal practitioner, Mr. *Masango*, states that the first respondent has instructed the second respondent to execute on the very judgment pending before MWAYERA J and doing so without first obtaining leave of the judge.

These two paragraphs are not reflective of the truth but are a regurgitation of clauses in the applicants founding affidavit wherein the applicants stated that their application in terms of rule 449 is pending determination before MWAYERA J.

In this regard in paragraphs 9.2 and 9.4 of her founding affidavit first applicant stated that:

> "9.2. HC 9651/15 is pending before the Honourable Mrs Justice MWAYERA before whom I made an application in terms of Rule 449 of the Rules of this Honourable Court.
> 9.4 To the knowledge of the 1st respondent that HC 9651/15 is pending before the Honourable Mrs Justice MWAYERA, the 1st respondent purports to enforce the very same judgment which is pending determination before the Honourable Mrs Justice MWAYERA."

In the last paragraph (12.3) the 1st applicant reconfirms her assertion that the application is before MWAYERA J when she stated that: -

> "The relief we seek is pending before the Honourable Mrs Justice MWAYERA. It is procedurally incompetent to enforce the writ on a matter which is pending before the very judge who issued the order sought to be enforced without first obtaining the leave of the judge."

When I queried whether the application was in fact pending before MWAYERA J, *Mr. Katsande* for the applicants was not forthright. He instead referred to the fact that after filing the Rule 449 application he had followed that up with a letter requesting the registrar to place

the record of proceedings before MWAYERA J. By virtue of that letter he now assumed that the rule 449 application was now pending determination before MWAYERA J. To buttress his point he referred to the case of *Mufundisi* v *Rusere* 2008(2) ZLR 264 wherein he said BERE J took a proactive role by directing his clerk to set down the matter before him. It was with that in mind that he surmised MWAYERA J would also deal with this application. Unfortunately counsel seemed oblivious of the fact that in *Mufundisi* v *Rusere* (*supra*) the learned judge had *mero motu* noted an error in granting an order as he did when there had been a notice of opposition filed by the other party. The order had been granted in the absence of the other party. In terms of r 449 (1) (a) the learned judge was perfectly entitled to attend to the error that he had noted. This is not the scenario here. In casu, the, applicants filed a court application in terms of r 449 (1) (b). As he aptly noted, in his written submissions, an application under r 449 can be heard by any judge in which case the procedural steps of a court application are followed. Counsel conceded that the necessary procedural steps had not yet been completed. In paragraph 2 of his written submissions he asked himself a rhetoric question:

> "Was the matter pending before the learned judge even before an answering affidavit and heads of argument had been filed?

To which he unsurprisingly answered:

> "Unquestionably it was. It has since been moved from the learned judge with effect from 29 January 2018. The matter is now pending before the High Court as opposed to before the Honourable judge."

Counsel erroneously believed that his letter was tantamount to placing the r 449 court application for determination before the judge. Clearly this was wrong. As counsel noted when his letter was placed before the judge the judges response to his letter was to the effect that the application was opposed and so it had to follow the procedures for opposed applications.

It was in this scenario that the certificate of urgency was prepared. Clearly this was wrong as the rule 449 being a court application was not before MWAYERA J.

In as far as the rule 449 was not before MWAYERA J, it was incorrect that 1st respondent required the Judge's leave to execute.

Another irregularity pointed out by first respondent's counsel was that the execution the applicants wished to have stayed had in fact been executed and so there was nothing to stay. Though the applicants' counsel contended that first respondent's counsel acted unlawfully by instructing the sheriff to execute when she had been served with the urgent chamber application

and, in the same vein, the sheriff ought not to have carried out the ejectment as he had been served with a copy of the urgent chamber application, this argument was not sustainable. The applicants' counsel could not show that service of the urgent chamber application had been done before the ejectment. The certificates of service applicants' counsel tendered showed that service at the first respondent's legal practitioners was only effected on 24 January 2018 at 16:32 hrs and on the sheriff at about 16:24 hrs.

As the time service was effected was towards the end of the day applicants' counsel could not rebut the first respondent's counsel argument that at the time the ejectment was effected the urgent chamber application had not been served.

The first respondent having obtained a judgement by consent on the 23rd November 2017 the next stage was execution. They had to wait till after the date applicants had agreed to have vacated on their own volition before instructing the sheriff.

The execution of the judgement on the 24th January 2018 can thus not be faulted as it was a natural consequence of the consent order of the 23 November 2017.

Had the applicants intended to stop the ejectment they could easily have sought a stay of execution at about the time they filed the court application under rule 449. As aptly noted by BERE J in *Mudekunye & Others* v *Mudekunye & Others* 2010(2) ZLR 225 at 235 B-C:

> "Execution of judgement is a natural consequence of a decision by the court. It is put in motion by due process of law and once it is properly carried out there can be no question of applying to stay it. Once the *status quo ante* is lost through due process it is virtually impossible to restore it. One has to endure the outcome of an appeal process or some other remedy like review. See judges' sentiments in *Delco (Pvt) Ltd* v *Old Mutual Properties* 1998 (2) ZLR 130(S)."

In *casu,* execution was effected before both 1st respondent and the 2nd respondent had been served with the application for stay. So by the time they were served there was nothing to stay.

Thus even if the application had passed the test pertaining to the certificate of urgency and urgency, the relief that applicants seek is untenable.

Accordingly I am of the view that the defective certificate of urgency cannot be cured and further the urgency of the matter has been overtaken by the execution such that it is no longer tenable to stay an execution that has been duly conducted in terms of the law.

Upon a consideration of all the points *in limine* raised above the application cannot succeed.

In the opposing affidavit 1st respondent asked for costs on a legal practitioner and client scale. I did not hear much debate on this aspect during oral submissions. First respondent's counsel asked for costs at that scale whilst applicants' counsel seemed subsumed with responding to issues of urgency and whether the r 449 application was pending before MWAYERA J or not. Upon a consideration of the matter I am of the view that costs on the higher scale are justified. The applicants had no just cause to persist with the application even after fatal defects in their application, including that the r 449 application was not pending before MWAYERA J, had been pointed out and the fact of the execution having been done before service of the purported urgent chamber application. It is only in order that applicants be ordered to pay costs on the legal practitioner and client scale.

Accordingly, the application is hereby dismissed with costs on the legal practitioner and client scale.

F M Katsande & Partners, Applicants' legal practitioners.
Gasa,Nyamadzawo & Associates, 1st respondent's legal practitioners
Chatsanga & Partners, 4th -7th respondents' legal practitioners.