GODFREY KATERERE

And

TAVONGA VANDIRAYI

And

THOMAS ZUNGA

Versus

TRIANGLE (PVT) LTD.

And

MR T. MHLANGA (N.O.)

And

THE MESSENGER OF COURT, CHIREDZI (N.O.)

HIGH COURT OF ZIMBABWE
MAWADZE J
MASVINGO, 16 & 17 AUGUST, 2017

URGENT CHAMBER APPLICATION

Mrs G. Dzitiro, for all applicants
Mrs R. Magundani, for the 1st respondent
No appearance for 2nd & 3 respondents

MAWADZE J: This matter epitomizes the dangers inherent in the multiplicity of proceedings in different courts over basically the same dispute. This is clearly undesirable.

This is an urgent chamber application arising from a labour dispute between the applicants and the 1st respondent who was the employer of the applicants. The 2nd and 3rd applicants are cited in their respective official capacities.

The applicants seek interim relief for a stay of execution of orders granted by the Magistrate sitting at Chiredzi, the stay of proceedings before the same Magistrate in three cases being case numbers GL 873/16, GL 874/16 and GL 875/16 and the suspension of the writ of execution arising from the said cases pending the return date.

I wish to point out that this court has said without number that an urgent chamber application must be accompanied by a provisional order sought in terms of r 247(1)(a) of the High Court Rules 1971 which is in form of Form 29 C or 29 D if it is for sequestration of an estate or winding up of a company. It is disheartening to note that some legal practitioners tend to invent their own versions of Form 29 C instead of the one provided for in the Rules. As a result, a lot of time is wasted dealing with points *in limine* relating to such mundane things or applications for amendment of the format of the provisional order which are surprisingly routinely opposed. The applicants' counsel is guilty of this omission.

The question of what constitutes urgency is basically settled in our law. The *locus classicus* is the case of *Kuvarega* v *Registrar General & Anor.* 1998 (1) ZLR 188 at 193 F – G (H). See also *Document Support Centre Ltd* vs *Mapuvire* 2006 (2) ZLR 240 at 243 C – D (H). *Bonface Denenga & Anor*. v *Ecobank (Pvt) Ltd. and Ors* HH 177/14 at pp 4 of the cyclostyled judgment. *In casu* the 1st respondent has not put into issue the question of urgency. Indeed, causes of action which might demand to be heard on an urgent basis include *inter alia* stay of execution or interdicts. The parties in this matter are agreed that the matter should be resolved on the merits.

In order to deal with the merits of this case it is useful to outline in some detail the background facts of this case giving rise to this application. The said background facts as outlined in applicants' founding affidavit were not controverted. Further, such background to a great extent informs the decision of this court.

Background facts

The applicants were part of the employees dismissed by the 1st respondent after disciplinary hearings. The date of dismissal is not stated. Thereafter the applicant challenged the dismissals by way of an appeal to the Labour Court at Gweru and also sought a review of those disciplinary proceedings in the same Labour Court.

On 12 December 2016 the applicants acting in terms of s 92 E (3) of the Labour Act [*Cap 28:01*] applied for a stay of execution (in this case eviction) to prevent them from being evited from the company accommodation which their erstwhile employer the 1st respondent provided before their dismissal. In that application there were 9 applicants and the respondents included Triangle (Pvt) Ltd and Hippo Valley (Pvt) Ltd.

Section 92E of the Labour Act [*Cap 28:01*] provides as follows;

"*92E Appeals to Labour Court generally*

(1) irrelevant

(2) irrelevant

(3) *pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires*."

The 1st respondent some 12 days later on 22 December 2016 issued summons out of the Chiredzi Magistrates Court in case numbers GL 873/16, GL 874/16 and GL 875/16 seeking the eviction of the applicants. The application before the Labour Court, Gweru was pending. The applicants entered appearances to defend in the Magistrates Court after which the 1st respondent applied for summary judgment.

The application for stay of execution in the Labour Court was only heard some 3 months later on 13 March, 2017 and the ruling was reserved. During the hearing in the Labour Court the parties haggled over the question of whether the Labour Court had jurisdiction to grant the stay of execution pending the determination of the appeal before the same court. Meanwhile the proceedings instituted by the 1st respondent in the Chiredzi Magistrates Court took off before the ruling by the Labour Court. The applicants unsuccessfully raised the defence of *lis alibi pendens.* The Magistrate was unimpressed and on an unclear date granted summary judgment in favour of the 1st respondent in cases numbers GL 873/16, GL 874/16 and GL 875/16. This entailed that the applicants were now to be evicted notwithstanding that their application to prevent such an eventuality was pending before the Gweru Labour Court.

Irked by the decision of the Magistrate the applicants on 9 May 2017 appealed to this Court against the order for summary judgment in case number HC/CIV 'A' 19/17. Pursuant to the rather confusing provisions of s 40(3) of the Magistrates Court, Act [*Cap 7:10]* the applicants on 10 May 2017 filed in the Magistrates Court an application for stay of execution pending the appeal.

Section 40(3) of the Magistrates Court Act [*Cap 7:10]* states as follows;

"40. *Appeals*

(1) not relevant

(2) not relevant

(3) Where an appeal has been noted the court may direct either that the judgment hall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

The war between the parties continued to rage on. Some 13 days later on 23 May 2017 the 1st respondent in turn filed in the same Magistrates Court an application for leave to execute pending appeal. It is not clear why the 1st respondent's application filed some 13 days after the one by the applicants was set down first on 19 June 2017. The application by the applicants was only set down almost some month later on 12 July, 2017. This is one of the complaints raised by the applicants in the review proceedings now before this court.

On 19 June 2017 the 1st respondent's application for leave to execute pending appeal was heard and the ruling postponed to 7 July 2017. Meanwhile on 6 July 2017 the Labour Court delivered its ruling in favour of the applicants granting a stay of execution. The applicants' legal practitioners clearly delighted by this positive development promptly wrote to the Magistrate at Chiredzi and to counsel for the 1st respondent. Needless to say their joy was short-lived.

On 7 July 2017 the Magistrate was unavailable to deliver the ruling on 1st respondent's application for leave to execute pending appeal. The present Magistrate indicated that there was no ruling in the record from the presiding Magistrate and postponed the matter to 11 August, 2017.

On 11 August 2017 the presiding Magistrate was now available to deliver the ruling on the application by the 1st respondent for leave to execute pending appeal. The applicants' counsel sought to address the court on implications of the order from the Labour Court and both applicants and 1st respondent's counsel were indulged. The applicants however allege that in the midst of those submissions the apparently disinterested presiding Magistrate stopped them in their tracks pronouncing that the Magistrate had already dismissed the applicant's application for stay of execution pending appeal and was to simply decide on 1st respondent's application for leave to execute pending appeal. Needless to say applicants' counsel felt short changed and this is one of the basis upon which the applicants have sought

for a review of the proceedings of the Magistrates Court before this court. The applicants allege bias if not corruption against the Magistrate.

The applicants allege that in the resultant confusion the Magistrate decided to postpone *sine die* the 1st respondent's application for leave to execute pending appeal. The applicants allege that they were advised to collect handwritten judgment dated 6 July 2017 dismissing their application from the Clerk of Court and promised to be furnished with a typed one on 16 August 2017. The applicants allege that to their utter amazement on 12 August 2017 the Messenger of Court knocked at their doors armed with a writ for their eviction. The applicants wonder as to when the application for leave to execute pending appeal had been granted as the matter had been postponed *sine die*. Upon inquiry they alleged they were advised it had been granted on 11 August 2017 apparently without notice to the applicants after the matter had been postponed *sine die*.

The above developments mirror the irregularities which inform the application for review filed by the applicants before this court. These are the backgrounds facts of this urgent chamber application. The applicants now face eviction within 48 hours.

The merits

The contention by the applicants is that the process leading to their imminent eviction is irregular and has to be chlorinated by this court through the process of review which they have filed. In addition, they allege bias and corruption on the part of the trial Magistrate. This is the basis upon which they seek interim relief.

In my respectful view the Labour Court order granted in favour of the applicants on 6 July 2017 by KACHAMBWA J is extant. It has not been appealed against. The 1st respondent has not taken any steps to have it set aside. That order prevents the eviction of the applicants.

I find the argument by *Mrs Magundani* for the 1st respondent that the order granted by the Labour Court on 6 July 2017 is a nullity to be untenable at law. If the 1st respondent genuinely believed that the Labour Court had no jurisdiction to grant such an order why did the 1st respondent not challenge the order in order to set into motion the process to have it set aside. Instead the 1st respondent decided to institute parallel proceedings in the Chiredzi Magistrates Court to deal with the same dispute which the Labour Court was to pronounce itself. This is the genesis of the plethora of proceedings in this dispute.

It is incorrect as the 1st respondent submitted that the Labour Court dealt with an application for vindication of property. All what the Labour Court was seized with was an application to stay the eviction of the applicants from the rented company accommodation

pending the hearing of the appeal. The consequences of the disciplinary proceedings which applicants appealed against included *inter alia* their anticipated eviction from 1st respondent's rented accommodation. In that vein the attack against the order by the Labour Court as a nullity is apparently not well founded at law. On that basis alone I would be inclined to grant the interim relief sought by the applicants.

I proceed, out of abundance of caution, to consider other aspects which inform my decision.

It is doubtful whether it was proper at law for the Magistrate to completely turn a blind eye to the defence of *lis alibi pendens* raised by the applicants. In addition, it seems improper in my view for the Magistrate to have dismissed the existence of the Labour Court order dated 6 July 2017 on the apparent misconception that it ought to be registered first before it could be of any effect.

The applicants in my view have satisfied the requirements for an interlocutory interdict. See *Setlogelo* v *Setlogelo* 1914 AD 221; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board 1996* (1) ZLR 289 (S); *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor. 2000* (1) ZLR 234 (H).

The applicants have shown a *prima facie* right even if it may be open to some doubt. The Labour Court order granted in their favour which is extant gives them the right to remain in occupation of the accommodation provided by the 1st respondent.

There is a well-grounded apprehension that irreparable harm would be occasioned to the applicants. The 1st respondent has not only commenced the process to evict them but is now armed with a writ to effect eviction within 48 hours. This is despite the protection afforded to the applicants by the order they sought and were granted by the Labour Court, which order is extant.

It is clear to my mind that the applicants have no other satisfactory remedy. How possibly can they fend off this imminent eviction besides approaching this court for a temporary reprieve pending the return date? They have matters pending before this court whose determination may simply be for academic purposes if they are not granted interim relief.

The balance of convenience favours the applicants. Their rights are yet to be pronounced with finality not only by the Labour Court through the pending appeal but to some extent through the review and appeal pending before this court. Once they are evicted it may not be feasible for them to return to occupy the said houses even if they succeed in the

pending matters before this court. If they are evicted they are to immediately look for alternative accommodation. The 1st respondent may even proceed to offer the same houses to other employees whose removal may trigger new legal battle fronts. On the other hand, the 1st respondent can always recover any pecuniary loss suffered from the applicants' terminal benefits.

It cannot be said that the appeal and review filed by the applicants before this court are doomed to fail. The applicants have a fighting chance. The granting of the summary judgment may well not be proper in the circumstances and the process leading to the granting of the application for leave to execute pending appeal or dismissal of application for stay of execution pending appeal by the Magistrates Court may be tainted with irregularities. The applicants should be allowed their day or days in court.

In conclusion this court has inherent powers to regulate its own proceedings. The only cardinal principle is that such powers should be exercised judiciously and in the interest of justice. As already stated this court is now seized with both an application for review and an appeal filed by the applicants. I am not satisfied that both the application for review and the appeal are frivolous.

In the exercise of my discretion I am inclined to grant the interim relief sought by the applicants in terms of the draft order as amended for it to conform to Form 29 C of the High Court Rules 1971 and by the deletion of the order for costs. It is in the interest of justice to protect the applicants at this stage and to put a stop to the multiplicity of proceedings which in my view amount to an abuse of the court process. This court has to draw a line in the sand and stop the apparent madness bedevilling this dispute.

Accordingly, the interim order is so granted as amended.

Mutumbwa Mugabe & Partners, applicants' legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners