REPORTABLE ZLR (16)

Judgment No. SC 23/04
Civil Appeal No. 368/02

JOSEPHINE MATAMBANADZO v NATU LALA GOVEN

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & CHEDA JA
HARARE MARCH 22 & MAY 10, 2004

J B Colegrave, for the appellant

I A Ahmed, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant and all persons claiming the right of occupation through her were ordered to vacate Flat No. 6, Belgrave House, Aberdeen Road, Avondale, Harare ("the property").

The relevant facts are as follows. In February 1999, the respondent ("Goven") purchased the property from the estate of the late John Harold West ("the deceased"). At the time of the purchase the appellant ("Matambanadzo") was in occupation of the property as a lessee in terms of an oral lease agreement concluded with the deceased prior to his death. The lease agreement was to expire on 30 June 1999.

Subsequently, on 26 March 1999 Goven's legal practitioner gave Matambanadzo written notice to vacate the property by the end of June 1999, but

Matambanadzo refused to comply. As a result, Goven's legal practitioner instituted a civil action in the High Court against Matambanadzo claiming, *inter alia*, her eviction from the property.

However, after Matambanadzo's legal practitioner had filed a special plea, alleging that the High Court did not have the jurisdiction to grant the eviction order sought because no certificate had been issued by the Rent Board, as required by s 30(4) of the Rent Regulations, 1982 (S.I. 626 of 1982) ("the Regulations"), the civil action was withdrawn on 5 May 2000.

Thereafter, Goven's legal practitioner submitted a written application for the requisite certificate to the Rent Board on 19 September 2000. Having received no reply, the legal practitioner submitted another application on 6 December 2000. Again, he received no reply. In both applications it was made clear that the property was required for Goven's personal use.

However, about a year later, on 7 November 2001, Goven's legal practitioner received a letter from the Ministry of Local Government, Public Works and National Housing, the Ministry responsible for the appointment and functioning of the Rent Board, informing him that the Chairman of the Rent Board had retired and that as soon as a new Chairman was appointed he (the legal practitioner) would be informed.

Nevertheless, Goven's legal practitioner subsequently filed a court application in the High Court against the Chairman of the Rent Board and the

Minister of Local Government, Public Works and National Housing, seeking, *inter alia*, an order directing the Chairman of the Rent Board to determine Goven's application for a certificate of ejectment filed with the Rent Board in September 2000. However, there is nothing in the papers before this Court indicating whether or not when the court application was filed a new Chairman of the Rent Board had been appointed.

The court application was not opposed, and on 19 December 2001, Goven was granted the following order:

> "1. The first respondent is hereby directed to determine the applicant's application for a certificate of ejectment filed on the 19th September 2000, within seven (7) days of service of this order.
>
> 2. Should the first respondent fail to comply with paragraph 1 of this Order, the applicant is granted leave to approach this Honourable Court for relief without further notice or recourse to the Rent Board.
>
> 3. …"

When the Rent Board did not comply with the order set out above, Goven's legal practitioner, acting on behalf of his client, filed a court application in the High Court against Matambanadzo seeking her eviction from the property. Matambanadzo opposed that application and filed a counter-application in which she sought the rescission of the order granted on 19 December 2001, directing the Rent Board to determine Goven's application for a certificate of ejectment within seven days, and providing that if the Rent Board failed to do that Goven would be entitled to approach the High Court for relief.

On 2 October 2002, the learned judge in the court *a quo* granted Goven's application for Matambanadzo's eviction, but dismissed Matambanadzo's counter-application. Aggrieved by that result, Matambanadzo appealed to this Court.

Two main issues arise for determination in this appeal. The first is whether Goven's application for Matambanadzo's eviction was properly granted, and the second is whether Matambanadzo had the requisite *locus standi in judicio* to seek the rescission of the order granted on 19 December 2001. I shall deal with the two issues in turn.

Before determining the first issue, I would like to set out the relevant provisions of subsections (2) and (4) of s 30 of the Regulations. They read as follows:

> "(2) Subject to the provisions of this section, no order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom, which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless, in addition -
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> (a) – (b) …; or
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> (c) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required -
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> (i) by the owner; or
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> (ii) where the lessee is a sublessee, by the person letting the dwelling to the sublessee;
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> for his personal residential occupation or the personal occupation of his parent, child or employee; or

(d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or

(e) …

(3)…

(4) No order for the ejectment of a lessee from a dwelling shall be made on the grounds referred to in paragraph (c) or (d) of subsection (2) unless the appropriate board has, on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable, and the date specified in the certificate for the vacation of the dwelling has passed." (emphasis added)

I now wish to deal with the first issue, which is whether the eviction order was properly granted. I have no doubt in my mind that in granting the eviction order the learned judge erred. I say so because in order to succeed in his application for Matambanadzo's eviction, Goven ought to have produced a certificate from the Rent Board to the effect that the requirement that Matambanadzo vacate the property was fair and reasonable. As Goven did not produce such a certificate, that should have been the end of the matter.

It is clear from the provisions of s 30(4) of the Regulations set out above that the certificate is a prerequisite to the granting of the eviction order.

Thus, in *Fletcher v Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S), at 261G-262A, GUBBAY CJ, commented on subsection (4) of s 30 of the Regulations as follows:

> "… subs (4) prohibits in express wording an order for ejectment on the grounds referred to in paras (c) or (d) unless the appropriate board issues a certificate."

In the circumstances, the order sought by Goven and subsequently granted on 19 December 2001, to the effect that if the Rent Board failed to determine Goven's application within seven days Goven could approach the High Court for relief without further recourse to the Rent Board, was misconceived. That is so because when considering an application for the eviction of a statutory tenant, which Matambanadzo is, on the grounds set out in s 30(2)(c) or (d) of the Regulations, the High Court does not have the power to grant an eviction order unless the Rent Board has issued the requisite certificate.

I now turn to the second issue, which is whether Matambanadzo had the *locus standi in judicio* to seek the rescission of the order granted on 19 December 2001. I think she had.

Her counter-application for the rescission of the said order was based on the provisions of r. 449(1)(a) of the High Court Rules, 1971 ("the Rules") which reads as follows:

> "The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order -
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;"

It is interesting to note that this Rule is identical to r. 42(1)(a) of the Uniform Rules of Court in South Africa which reads as follows:

> "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby …"

Commenting on the purpose of Rule 42(1) in *Theron N.O. v United Democratic Front and Ors* 1984 (2) SA 532 (C) at 536D-F, VIVIER J said the following:

> "Rule 42(1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted. The Court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only."

I entirely agree with these comments. In my view, they apply to Rule 449(1)(a) of the High Court Rules with equal force.

The issue which I now wish to consider is what the applicant for an order rescinding a judgment or court order ought to show in order to establish that he has the requisite *locus standi in judicio*. That question was answered by CORBETT J, as he then was, in *United Watch & Diamond Company (Pty) Ltd & Ors v Disa Hotels Ltd & Anor*, 1972 (4) SA 409 (c) at 415 A-C, as follows:

> "In my opinion, an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi*, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted."

I entirely agree with the learned judge, and that is the test which I shall apply in considering whether Matambanadzo had the requisite *locus standi* to seek the rescission of the order granted on 19 December 2001.

Applying that test, I am satisfied that she had the requisite *locus standi*. In my view, she had a direct and substantial interest in the subject-matter of the order which would have entitled her to intervene in the original application in which the order was granted.

I say so because the order sought by Goven and later granted on 19 December 2001 provided that if the Rent Board did not determine his application within seven days, Goven could approach the High Court for relief (i.e. Matambanadzo's eviction) without further recourse to the Rent Board. The effect of that order, as averred by Matambanadzo in her affidavit, was the removal of the protection granted to her as a statutory tenant by s 30(4) of the Regulations. She is undoubtedly correct, and she would have been entitled to intervene in the original application for that reason.

In my view, it follows that the order in question was erroneously sought and granted in Matambanadzo's absence, and that the learned judge in the court *a quo* ought to have granted the counter-application.

In the circumstances, the following order is made:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is set aside and the following is substituted:

"(a) The application is dismissed with costs.

(b) The counter-application is granted with costs."

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Hussein Ranchod & Co, appellant's legal practitioners

Ahmed & Ziyambi, respondent's legal practitioners