

(1) RITA MBATHA (2) IVYN GABRIEL MBATHA
v
(1) VINCENT NCUBE (2) THE MESSENGER OF COURT

**SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 15, 2018 & MARCH 7, 2018**

Applicant in person

Mr. T. Chinofukutwa, for the first respondent

Second respondent in default

Before MAKARAU JA, in chambers in terms of r 5 of the Supreme Court Rules.

On 9 February 2018, the applicants filed an urgent Chamber Application for an order staying “proceedings” pending the hearing of an appeal in this Court under case number 847/2017. The first applicant is a self-actor who also purports to act on behalf of the second applicant. In the absence of a power of attorney authorising her to do so, the first applicant cannot lawfully represent the second applicant without violating ss 10 and 12 of the Legal Practitioners Act [*Chapter 27.07*].

On the date that the matter was first set down before me, I directed that the applicant be referred to the Legal Aid Directorate for assistance. The applicant did not manage to secure legal representation from the Legal Aid Directorate and was content to continue representing herself and the second applicant in these proceedings.

The background facts to this application are somewhat confusing. The first applicant, who deposed to the founding affidavit, could have presented the facts more coherently and chronologically in her founding affidavit. As it is, the facts need to be pieced together from not only this application but from other papers filed in previous proceedings between the parties. The facts lack fullness in some details. It is however my view that these shortcomings in the presentation of the facts do not deter me from disposing of the matter as I do.

On a date that is not material, the first respondent obtained from the Magistrates' Court an order for the eviction of the applicants and all who claim occupation of a property identified as House Number 126 Edgemoor Road, Meadowlands Park, Hatfield Harare through them. This was under MC 39520/16.

The first applicant alleges that there were a number of irregularities attendant upon the hearing of the matter in the Magistrates' Court among which is an alleged lack of jurisdiction on the part of the lower court and a failure on the part of the court to afford her a fair hearing. There is also an allegation made but not pursued that the eviction order was granted in the full knowledge of a prior order by the same court which had stayed all proceedings between the parties.

The application for review in the High Court was filed on 16 August 2017. This was under case number HC 7542/17. In the application, the applicants challenge the order of eviction granted by the Magistrates' Court mainly on the basis that the Magistrates' Court did not afford the applicants a fair hearing in that the court refused to grant them a postponement to enable them to file a replying affidavit in the matter.

The application for review is pending before the High Court.

On 5 October 2017, the applicants, facing imminent eviction on the 6 October 2017, filed an urgent application in the High Court, seeking stay of the eviction pending the finalisation of their application for review.

The High Court dismissed the application.

In dismissing the application, the High Court had this to say:

“The conduct of the applicant does not clothe the application with urgency but borders on abuse of court process. Approaching the court more than once to try and stop execution which is imminent does not make a matter urgent. The applicant appears to have waited till the day of reckoning and sought to seek redress on more than one occasion on the same facts involving the same parties on an urgent basis. The fact that the urgency is self-created militates against the granting of the application. In any event there are no prospects of success on the pending review such that the balance of convenience does not favour the granting of the application.”

In passing I wish to comment on the wording of the above finding. I find it ambivalent and seeming to suggest that after finding that the application was not urgent, the court *a quo* nevertheless went ahead to assess the merits of the matter. I however take no issue on this lack of clarity by the court *a quo* for the purposes of determining this application.

Aggrieved by the dismissal of their urgent application in the High Court, the applicants noted an appeal to this Court under case number SC 847/17.

The grounds of appeal are as follows:

1. The High Court grossly erred and misdirected itself in fact and in law by overlooking the fact that a warrant of eviction by the Messenger of Court was only addressed to the first appellant and excluded the second appellant, thereby giving the impression that it was only first appellant who was supposed to be evicted. This was fatally defective.
2. The High Court misdirected itself in that the eviction of the appellant ought to have been stayed in light of the fact that the Magistrates' Court did not have jurisdiction between the parties' lease agreement and issue warrants of eviction as the parties had in their lease agreement agreed to the jurisdiction of the High Court (sic). Such an approach was irrational in light of the incontrovertible evidence on record.
3. The court *a quo* misdirected itself in law by failing to appreciate that there was a court order by the Magistrates' Court that is case number MC 3294/14 whose facts are similar to the current magistrates' case number MC 39520/16 which had stayed all the Magistrates' Court proceedings between the parties pending finalisation of the High Court review application under case number HC 5947/14.
4. The court *a quo* misdirected itself on the facts and the law in the sense that it grossly failed to consider that there was another review application pending before it under case number HC 7542/17 for review of the Magistrates' Court proceedings in MC 39520/16.
5. The High Court grossly erred and misdirected itself on the law and facts by failing to appreciate that there was a rent board ruling which set aside the fraudulent rent order which the first respondent relied on to get a judgment for eviction of appellants at the Magistrates' Court.

6. Appellants were not afforded the opportunity to oppose the costs which were not requested by the respondents and to place in that regard additional evidence bearing on why such confirmation should be countenanced.

As is clear from the above grounds of appeal, the applicants take issue with the merits of the matter rather than the narrow procedural issue of whether or not their application before the court *a quo* was urgent.

I make the point at this stage that the applicants are approaching this Court to test the correctness or otherwise of the decision of the court *a quo*, both in the appeal and in the urgent Chamber Application before me as I demonstrate below.

Being faced with another notice of removal scheduled for 9 February 2018, the applicants, on the same date, filed the present application for stay of proceedings pending the determination of the appeal. In the application, the applicants initially prayed for an order staying execution of the decision of the Magistrate' Court under case number MC 35920/17 and of the decision of the High Court under case number HC 9296, pending finalisation of the appeal under case number SC 847/17.

At the hearing of the matter, the first applicant successfully applied to amend the prayer in their application to include an order that the registrar be directed to set down the appeal on the earliest available court date. There was no argument from the first respondent against the granting of this part of the order which became the first part of the draft order. It is the granting of the second part of the order that has exercised my mind.

Firstly, it is clear that there is no operative part of the High Court order that can be executed upon. The High Court dismissed the application as detailed above. There is therefore nothing to stay as simply put, the order dismissing the application for stay of execution is not executable.

Secondly, it is clear that in real terms, the applicants are essentially seeking an order staying the execution of the Magistrates' Court order evicting them and all those who occupy the leased properties through them, pending the determination of the appeal noted to this Court.

The appeal to this Court as stated above, challenges the correctness or otherwise of the High Court decision denying stay of execution of the Magistrates' Court judgment pending determination of the review application. Assuming that the appeal succeeds, this Court will grant stay of execution of the judgment of the Magistrates' Court pending the determination of the review application as this was the relief that was denied the applicants by the court *a quo*. This is the very same relief that is being asked for in the application before me.

It then appears to me that what the applicants are effectively seeking to do in this application is to have a judge in chambers grant them the exact relief they are seeking on appeal. It further appears to me that I cannot competently deal with the Chamber Application without usurping the powers of the appeal court that is still to determine the appeal.

It is the settled position that a judge in chambers cannot exercise the jurisdiction of the appeal court proper.

I contrast and distinguish the facts of this application from the facts in *University of Zimbabwe v Kwanele M. Jirira and Others* SC 6/13 where ZIYAMBI JA granted stay of execution of an arbitral award pending an appeal against the order of the High Court refusing it a stay of execution. In that matter, the first and second respondents, former employees of the applicant, commenced execution against the property of the applicant in satisfaction of an arbitral award whose award and quantification were on appeal before the Labour Court. After the award was registered with the High Court, the applicant unsuccessfully approached the High Court for an order staying the execution. At the time of the hearing of the application for stay of execution, the appeals in the Labour Court had been dismissed and the applicant had applied for leave to note an appeal to the Supreme Court. The application for stay was granted as the Honourable Judge was of the view that the High Court had misdirected itself in holding that it had no jurisdiction in the matter. In that matter the issue for determination by the appeal court was not whether or not the High Court had jurisdiction in the matter but the correctness of the award by the arbitrator and its quantum.

In *casu*, the correctness of the decision by the court *a quo* not to grant the application for stay are issues for determination both before me in the current application and before the appeal court. As indicated above, it is my view that a judge in chambers does not enjoy parallel jurisdiction to that of the appeal court.

Having found that I cannot stay the execution of the order of the Magistrates' Court, I must dismiss that part of the application seeking stay of execution of the eviction order. However, in view of the fact that the respondent has not opposed the application for the matter to be heard on the earliest available date, and the facts of the dispute between the parties require that the matter be finalised at the earliest, I will grant the second part of the application seeking an early hearing date.

In the result, the application succeeds in part and I make the following order:

1. The application for stay of execution of the Magistrates' Court order is dismissed.
2. The registrar of this Honourable Court is hereby ordered to set for hearing the appeal under case number SC 847/17 on the earliest available date.
3. Costs of this application shall be in the cause.