

REPORTABLE (17)

TENDAI MASHAMHANDA
v
(1) BARIADIE INVESTMENTS PRIVATE LIMITED AND
(2) SHERIFF OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
HARARE: 10 DECEMBER 2023

L Madhuku with K Rangarirai, for the applicant

T. L Mapuranga with S Sadomba, for the first respondent

No appearance for the second respondent

CHAMBER APPLICATION

Judgment No. SC 17/24
Chamber Application SC 680/23

1

BHUNU JA:

INTRODUCTION

1. The parties have been in and out of the courts embroiled in ferocious battles over the ownership, possession and occupation of a certain piece of property commonly known as the Remainder of Subdivision C of Plot 6 of Lots 190, 191, 193, 194 and 195 of Highlands Estate of Welmoed also known as number 41 Ridgeway North, Highlands, Harare (the property).
2. The Supreme Court has since finally resolved the ownership dispute in the respondent's favour in judgment number SC 24/22. The court order granted the respondent the right to vindicate its property from the applicant who is in occupation of its property against its will.

3. In a bid to enforce its court given right of eviction, the respondent successfully sued applicant for eviction in the High Court (the court *a quo*). On 29 November 2023 the court *a quo* issued an eviction order in case number HC 666/23) under judgment number HH 637/23.
4. The applicant has now filed an urgent chamber application for an interim interdict to stay execution pending the determination of his appeal against the court *a quo*'s judgment. The application is opposed.
5. Although I was part of the panel of three judges which determined the ownership dispute, I have no qualms presiding over this application. This is because these are enforcement proceedings which have a bearing over the execution of the Supreme Court judgment I presided over together with two other judges of the Court. *In Cohen v Cohen* 1979 RLR 184 at 187B the court held that: **Judgment No. SC 17/24 Chamber Application SC 680/23**
“Execution is a process of the court and the court has inherent power to control its process subject to the Rules of court.”
6. No party has raised any issue in this regard. I therefore proceed to determine the application before me on the merits.

POINTS IN LIMINE

7. At the commencement of this hearing, Mr. *Mapuranga* raised 3 points *in limine*. I deal with them in sequence.
 - i) The first objection is that the application does not comply with r 11C (4) of the Supreme Court Rules 2018 which provides for the pagination and indexing of electronic documents. The rule requires an applicant to paginate and provide an index of documents filed of record. Considering that this is an

urgent chamber application, I was inclined to turn a blind eye to some of these niceties which, though necessary do not affect the substance of the application. In any case we now have a paginated merged electronic record of the proceedings. The objection has however since been abandoned rendering it unnecessary to determine the issue.

- ii) The second objection is that the draft order is incompetent in that it is requesting a judge sitting in chambers to issue a substantive order setting aside para 4 of the court *a quo*'s order. The paragraph is couched in the following terms: “*This order shall remain operational notwithstanding any appeal that may be filed by the respondent*”. I take the robust view that this is an issue best suited to be determined by the appellate court. At the moment it is incumbent upon me to deal with the real issues and substance of the dispute before me without getting bogged down with technicalities.
- iii) The third objection is that it is incompetent to interdict a lawful order issued by a court of law on proof of a mere *prima facie* right. Again, I take the view that this is a substantive issue to be determined on the merits on appeal. I am therefore constrained not to sustain the objection. I say so because the legality of part of the order appealed against is already under contest on appeal. I therefore tend to agree with Mr. *Madhuku* that the competency or otherwise of the court order sought in the circumstances of this case is a substantive issue to be determined on the merits on appeal. I therefore turn to determine the application on the merits.

FACTUAL BACKGROUND

8. The parties are now entangled in a vicious contest over the possession and occupation of the property which was fraudulently sold to him while it was under judicial attachment sometime in September 2017. The respondent subsequently purchased the property at a valid Sheriff's sale in circumstances where the respondent had already obtained defective title. He obtained tainted title to the property on 5 May 2022 and has been in unlawful occupation of the property from 2020 to date. He claims to have made massive developments on the property to the tune of US\$1 500 000.00 (One and a half million United States dollars) over a period spanning 5 years. On that score, he resists eviction claiming an improvement lien over the developments he allegedly effected on the property.

9. The applicant has lost the battle for ownership of the property. He now concedes that the Supreme Court correctly determined that the respondent is the lawful owner of the property. Despite having put up a brave fight, he has now capitulated and states at para 16 of his founding affidavit that:

“16. I very much accept and abide by the judgment of this court that determined that my home is owned by the respondent.”

10. The concession is however being made in circumstances where there has been a concerted relentless attack on the correctness and integrity of the impugned but correct Supreme Court judgment without any remorse or recant from the applicant.

11. It is common cause that on 19 September 2019 CHAREWA J issued a provisional order interdicting the applicant from proceeding with the demolition of old structures and construction of new ones on the property. Notwithstanding the interdict, the applicant in contempt of the court order proceeded with the prohibited conduct.

12. The respondent is now the undisputed owner of the hitherto disputed property. The dispute has now whittled down to possession and occupation rather than ownership of the property. The ownership dispute has since been resolved to finality by the courts in favour of the respondent at the highest level.

13. In a bid to execute its right of vindication, the respondent applied for and obtained an eviction order from the court *a quo* dated 29 November 2023. The applicant seeks to block the respondent from executing the court *a quo*'s writ of execution in the interim, pending the determination of his appeal to this Court. He seeks the following relief:

“IT IS ORDERED THAT:

1. Pending the determination of the appeal in SC 666/23, para 4 of the operative part of the High Court judgment No. HH 637–23, handed down by the Honorable Justice TAKUVA on 29th November 2023 be and is hereby set aside.
**Judgment No. SC 17/24
Chamber Application SC 680/23**
2. Pending the determination of the appeal in SC 666/23, the respondents be and are hereby interdicted from evicting the applicant from his home, known as the Remainder of subdivision C of Plot 6 of lots 190, 191, 193, 194 and 195 of Highlands Estate, of Welmoed, also known as Ridgeway North, Highlands, Harare.
3. There shall be no order as to costs.”

THE APPLICANT’S CASE

14. The applicant’s acceptance of the correctness of the judgment conferring ownership on the respondent does not however, bring the contest between the parties to finality. The applicant now seeks to resist eviction from the property on the basis of an improvement lien against the respondent. His case is in this respect captured at paras 17 to 19 of his founding affidavit where he states that:

“17. My present dispute with the respondent relates to its right to evict me from my home in the circumstances of this matter. Firstly, I challenge the right

of eviction without paying me for the huge improvements I effected to the property. I believe that I have an improvement lien which gives me the right to remain in occupation until the respondent has compensated me for the improvements.

18. Secondly, it is my further belief that it is unconstitutional, being an infringement of the property right in s 71 (3) of the constitution, for the High Court to order my eviction without the respondent compensating me for the improvements.
19. Thirdly, I also believe that a house is involved here, s 74 of the Constitution, properly construed gives me an automatic stay of eviction once I appeal to a higher court against an order of eviction. In this regard the High Court's order allowing eviction pending appeal runs contrary to the constitution."

THE RESPONDENT'S CASE

15. The respondent basically resists the application for stay of execution on the premises that the applicant is a *mala fide* illegal occupier of its property. Its further contention is that the applicant effected the alleged improvements in flagrant violation of an extant court order to the contrary.

**Judgment No. SC 17/24
Chamber Application SC 680/23**

6

16. It further questions the legality and value of the structures put up by the applicant on the property.

CONCESSION AND ISSUES FOR DETERMINATION.

17. During the course of the hearing, Mr. *Madhuku* made the vital concession that the applicant's alleged developments were made against an extant court order prohibiting such developments.
18. The concession has the effect of defining and narrowing the issues on the applicant's prospects of success on appeal. The concession resolves the dispute as to whether the applicant is a *bona fide* possessor or occupier of the property. On the basis of the

concession made by Mr. *Madhuku*, I hold that the applicant is a *mala fide* possessor or occupier of the property. That finding is consistent with the Supreme Court's finding in SC 24/22 in which it came to the same conclusion that the applicant was not a *bona fide* buyer of the disputed property.

19. The sole issue which then remains for determination is whether the applicant being a *mala fide* possessor or occupier has reasonable prospects of retaining occupation of the respondent's property on appeal.

REQUIREMENTS FOR STAY OF EXECUTION

20. The requirements for an application of stay of execution were set out in *Cohen v Cohen* 1979 RLR 184. In that case the court held that, for the court to grant stay of execution it must be satisfied that an injustice would result if stay was granted. **Judgment No. SC 17/24 Chamber Application SC 680/23**
Chibanda v King (1) 1983 ZLR 116. In the words of MAFUSIRE J in *Reef Mining (Pvt) Ltd & Another v The Sheriff* HH – 163 – 15, “it would mean justice would turn on its head if stay was not granted”.
21. It is now incumbent upon me to determine whether the applicant has met the test set out in the *Cohen* case and related precedents *supra*.

ANALYSIS AND DETERMINATION

22. At the commencement of his oral submissions Mr. *Madhuku* under challenge conceded that para 2 of his draft order cited in para 13 above, was fatally defective in that it prays for a final interdict in an urgent application for stay of execution. He then orally

applied for an amendment of the paragraph to read ‘stay of execution’ instead of ‘interdict’.

23. I granted the application for amendment offhand as the error appeared to have been an inadvertent slip of the pen. Although legal practitioners are expected to proceed with due care and diligence in drafting legal documents at all material times, the courts are inclined to relax the strict adherence to the rules on account that in an urgent application, the legal practitioner will be operating under extreme pressure due to the urgency of the matter. This is however not an open license for legal practitioners to be reckless in matters of this nature otherwise they may attract penalties for their clients.

24. Both counsel for the applicant and the respondent appeared to be agreed that the position of the law is that as a general rule, a *mala fide* possessor or occupier has no right of retention or compensation arising from improvements made to the disputed property. Mr. *Madhuku* however, took the view that there might be exceptions to this general rule. To this end, he referred me to a passage in Silberberg and Schoeman’s *The Law of Property*, fifth Edition at p 117 where the learned authors say:

“13.2.6.5 Occupier in bad faith

The right of a *mala fide* occupier to compensation for necessary and useful expenses has not yet been settled. It has been suggested that in view of the extension of the *bona fide* possessor’s action to a *bona fide occupier*, the *mala fide* possessor’s action must by analogy be taken to have been extended to a *mala fide* occupier. Several cases in which the position of a *mala fide* occupier was considered, are of little assistance. As the occupier was regarded as a *mala fide* possessor. **However in a case decided in the Orange Free State, *Peens v Botha Odendaal*, the view was taken that a *mala fide* occupier does not have a right of retention in respect of useful expenses and apparently also has no right to compensation in respect of such expenses.** It is respectfully submitted that the former view is preferable; particularly in the light of the fact that the court in any case has a discretion to order the removal of the improvement in lieu of compensation or to disallow a claim of compensation even where separation is impossible, if the improvement is not useful to the owner of the property and the expenditure excessive, regard being had to the occupier’s means and position.”
(My emphasis)

25. At p 414 the learned authors go on to state that:

“It has recently been found that an improvement lien will not be allowed where the owner will never have incurred a similar type of useful expense himself.”

26. On the other hand, in developing his argument Mr. *Mapuranga* for the respondent countered that the respondent as owner of the disputed property is entitled to all the rights of ownership of property. These include the right to vindicate and take possession or occupation of the property from whoever has possession without his/her consent. To this end, he placed reliance on the illustrious case of *Chetty v Naidoo* 1974 (3) (A) at 20B-D where the appellate Court observed that:

“It is in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner. (e.g. a right of retention or a contractual right). The owner in instituting a *rei vindicatio* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*- the onus being on the defendant to allege and establish any right to continue holding against the owner (cf. *Jeena v Minister of Lands*, 1955 80 (AD) at pp 382E, 383). It appears to be immaterial whether in stating his claim, the owner dubs the defendant’s holding “unlawful” or “against his will” or leave it unqualified (*Krugaersdorp Town Council v Fortuin*, 1956 92) SA 335 (T)...”
(My emphasis).

27. The legal principles espoused in the *Chetty* case *supra* were quoted with approval in the local case of *Mashave v Standard Bank of South Africa* 1998 (1) ZLR 436 (S) where this Court said:

“The Roman Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser.”

PROSPECTS OF SUCCESS

28. It is plain that the passage in the text book upon which Mr. *Madhuku* seeks to rely to resist eviction for the time being does not support what he intends to achieve. The text

makes it clear that ordinarily a *mala fide* occupier has neither the right of retention nor compensation for improvements made to the property. In the words of the text:

“However in a case decided in the Orange Free State, *Peens v Botha Odendaal*, the view was taken that a *mala fide* occupier does not have a right of retention in respect of useful expenses and apparently also has no right to compensation in respect of such expenses.”

29. With respect, Mr. *Madhuku*'s stance that a *mala fide* let alone an unlawful occupier in defiance of a court order may have a right of retention or compensation is based on an untested flimsy speculative opinion of the authors which does not set any precedent. As such the opinion is only fit for the moot court, not a real court of justice. More so, sitting as a single judge in chambers I would hesitate to upset the apple cart of long established precedent and conventional legal principles. The final determination in this respect however, lies with the Supreme Court and certainly not in my chambers.

Judgment No. SC 17/24

Chamber Application SC 680/23

10

30. In my view, the proffered opinion is bad at law and goes against the grain of Zimbabwean public policy and established legal principles that one cannot be allowed to benefit from his own wrong or unlawful conduct. The applicant having admitted that he is unlawfully occupying the respondent's property in bad faith as determined by the Supreme Court, such type of conduct cannot be sanctioned by the courts. It is unconscionable and manifestly unjust for the courts to perpetuate unlawful or wrongful conduct.

31. To make matters worse, before me, the applicant was unable to demonstrate how he had arrived at the value of one and a half million United States dollars. Above all, when challenged he was unable to demonstrate that the improvements he allegedly made on the disputed property were lawful structures. All this he could easily have proved by producing evaluation reports, approved architectural drawings and inspection reports.

This he failed to do. He could not provide even an *iota* of evidence in this regard. He also failed to prove that these were necessary improvements which the respondent could have effected left to his own devices.

32. Being the applicant, it is trite that the onus was always on him to prove that the amount claimed was reasonably deserved. Above all he bore the onus of proving that the structures he seeks to retain are lawful buildings. His failure to discharge his onus in these respects puts the Court in danger of perpetuating an illegality should it rule in his favour at the expense of the lawful owner of the property. Our courts have said time without number they cannot sanction an illegality. See for instance *Gong v Mayor Logistics (Pvt) Ltd* SC 2/17 quoted with approval in *Cecil enterprises v Sithole* SC 87/17. Allowing the applicant to retain occupation of the property would be contrary to law, public policy and in direct violation of the extant prohibition order of CHAREWA
Judgment No. SC 17/24
Chamber Application SC 680/23
J.

33. In a desperate attempt to salvage his case, the applicant sought refuge in s 71 (3) of the Constitution. The section prohibits compulsory acquisition of property without compensation.

34. At p 4 of his judgment the learned judge *a quo* correctly analysed the facts and the law and came to the inevitable conclusion that the applicant has no right of retention of the property. The learned judge's remarks in this respect bear repetition:

“In a futile attempt to rope in s 71 of the Constitution of Zimbabwe, it was argued on respondent's behalf that failure to compensate him for the “massive improvements” amounts to compulsorily depriving the respondent (applicant) of his property contrary to s 71 of the Constitution. This argument has no merit in

that on the evidence, any improvements made were in violation of the order by CHAREWA J.

In *Cecil Enterprises v Sithole* SC 8/10, it was held that:

“There is cogent authority to the effect that where the transfer of property is done in defiance of an order of Court the transferee obtains defective title. In *Gong v Mayor Logistics (Pvt) Ltd* SC 2/17, the Court stated as follows at p7:

‘At this juncture, it does not seem to matter to me whether or not the applicant was first purchaser as he alleges. What is material at this stage is that he obtained defective title in defiance of a valid court order and *caveat*. It is an established principle of our law that anything done contrary to the law is a nullity. For that reason, no fault can be ascribed to the learned judge’s finding in the court *a quo* that the conduct of the appellant and his lawyer in obtaining registration of the disputed property to the contrary was reprehensible. On the basis of such finding the appeal can only fail.’

The appellant’s claim is based on a nullity. A nullity is an event that never happened in the eyes of the law.”

35. On the plain facts of this case, it is difficult to fault the learned judge *a quo*’s line of reasoning and conclusions of both facts and law. The applicant has been to and from the Constitutional Court without success. He failed to raise the constitutional issues which he now wants to pursue in the lower courts. I observe in passing that s 71 (3) does not seem to protect persons in unlawful possession or occupation of other people’s property. It is instead a shield which protects people against compulsory deprivation of their property without compensation. The section reads:

“(3) Subject to this section and to section 72, no person may be compulsorily deprived of **their property** except where the following conditions are satisfied—“(My emphasis)

36. The use of the phrase, ‘their property’ connotes that one must own the property subject to compulsory acquisition in the sense that it must be his/her property, failure which the applicant falls outside the protection of the section. The applicant having openly confessed that he does not own the property, it follows that he falls outside the ambit of

the law under which he seeks protection. That law instead protects the respondent against compulsory deprivation of its ownership rights without compensation because it is admittedly the owner of the property in dispute. That being the case, the applicant cannot weaponize the section to deprive the respondent of its ownership rights specifically protected under that section.

37. The applicant also seeks to fasten onto s 74 of the Constitution in resisting eviction complaining that his eviction from the home he had set up on respondent's property infringes the provisions of s 74 of the Constitution. The section provides as follows:

“74 Freedom from arbitrary eviction

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”

38. It is plain that the section seeks to protect people from arbitrary eviction from their homes or destruction thereof without a court order. **Judgment No. SC 17/24 Chamber Application SC 680/23** Looked at from a different angle, the section authorises the eviction of any person from his home under a court order issued by a court after considering all the relevant circumstances. In this case, the eviction order was issued by a competent court of law after a full hearing and consideration of all the relevant circumstances. In that case, the applicant can hardly be heard to complain, that he was arbitrarily evicted from his home without due process in contravention of s 74.

39. The applicant's other complaint is that he was not given adequate notice in violation of children and people's rights. Mr *Mapuranga* counsel for the respondent countered that the applicant was given at least 1 year 8 months' notice. He was therefore not entitled to any further notice. I did not hear the applicant to refute that assertion. In my view I

am inclined to agree with Mr *Mapuranga* that 1 year 8 months constitute more than adequate notice. The applicant's complaint about being given inadequate notice is therefore without merit considering that he has been in unlawful occupation of the respondent's property for so long. In saying so, I am mindful of the fact that the court needs to balance the parties' competing rights and obligations.

40. In this case the odds, the law and the balance of convenience favour the respondent which has done nothing wrong to be deprived of its property rights specifically protected by the laws of the land.
41. The applicant's further complaint is that the court *a quo* erred in ordering his eviction despite the fact that his appeal to the Supreme Court suspended execution of the judgment appealed against.

Judgment No. SC 17/24
Chamber Application SC 680/23

14

42. While it is correct that at common law it is a rule of practice that an appeal against a judgment of a Superior Court suspends the decision appealed against, that rule of practice can be ousted by statute. As correctly pointed out by Mr *Mapuranga* r 44 (2) of the High Court (Commercial Division Rules) 2020 ousts the common law position. It provides that:

“(2) An appeal from the decision of the court shall not suspend the operation of the decision appealed against, unless the court or judge directs otherwise on application by the aggrieved party”

43. From the pleadings, it is however, not clear whether or not CHAREWA JA was sitting in the Commercial Court when she delivered her judgment in this matter. If she was, r 44 of the Commercial Court rules puts paid to the applicant's complaint that his appeal

to the Supreme Court had suspended the judgment appealed against as I did not hear Professor *Madhuku* to advance any counter argument.

44. Rule 44 is exclusive to the High Court Commercial Division. If she was not sitting in the Commercial Division, it however makes no difference because, as we have already seen in para 5 above, the court *a quo* had inherent jurisdiction to control its judgment. In *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598T the court held that:

“In stating the common law, CORBETT JA referred to the automatic stay of execution upon the noting of an appeal, as a rule of practice, subject to the court’s discretion, That is, not a firm rule of law, but a long established practice regarded as generally binding, **subject to the court’s discretion**. Moreover, the authorities cited by CORBETT JA are authorities relevant to appeals from Superior courts. The reference to this rule as a rule of practice shows the acceptance by the learned Judge of Appeal of the analysis by JENSSEN J. **This analysis leads inexorably to the conclusion that the grant or withholding of a stay of execution, is at common law, a matter of discretion, reserved to a court in which such a discretion is imposed**”. (My emphasis)

45. The High Court being a court of unlimited inherent jurisdiction, it follows that the court *a quo* had inherent jurisdiction to grant or not to grant stay of execution in the exercise of its discretion.

DISPOSITION

46. Having heard both parties, it is time to determine their competing interests with due regard to guiding precedent. In *Chibanda v King* 1983 (1) ZLR 116 in an application for stay of execution pending appeal, the court had this to say:

“It must also be borne in mind that if the court were to extend mercy, it will be doing it at the expense of a litigant who has already established in court his right and title to what is being claimed. Such mercy should rather be sought in the main action itself before judgment is given.”

47. In this case the respondent established beyond question in open court that it is the owner of the property. As we have already seen, the law has decreed that possession of property should normally be with the owner and that no one should take away the owners possession or occupation without the owner's consent in the absence of just cause.

48. With regard to the equities, in *Tranos Toziva Madaka* H – B – 116 – 89 in a similar case, the High Court correctly held that:

“The court has however a discretion to grant an application to execute on the judgment prior to a hearing of the appeal. In exercising that discretion the court should consider what is just and equitable in all the circumstances”.

49. The applicant has been in unlawful and *mala fide* occupation of the respondent's property for close to 5 years in circumstances where the law is heavily weighed against him as demonstrated elsewhere in this judgment. I therefore hold that his prospects of success on appeal are pretty dim indeed. The equities and balance of convenience favour the respondent who in legal parlance should ordinarily be in possession and occupation of its property. The applicant's conduct in unlawfully occupying the respondent's property in bad faith, to his exclusion for a period spanning 5 years without its consent is manifestly unjust and unconscionable.

50. Considering that the applicant has dismally failed to discharge the onus of proving that he has any reasonable excuse for clinging onto the respondent's property without its consent, the application cannot succeed as his prospects of success on appeal are bound to fail. Thus dismissal of the application will meet the justice of the case without turning it on its head.

51. In the final analysis I hold that the applicant has failed to meet the requirements of the test for stay of execution set out in the *Cohen* case and other related precedent *supra*.
52. As regards costs, I see no basis for departing from the norm that costs follow the result. I am not persuaded that costs at the higher scale are merited.
53. It is accordingly ordered that:
1. The application be and is hereby dismissed with costs.

Rangarirai & CO, the applicant's legal practitioners

Judgment No. SC 17/24
Chamber Application SC 680/23

17

Gill, Godlonton & Gerrans, the 1st respondent's legal practitioners.