SWINDALE PROPERTIES

and

BRIGHT TECH ENTERPRISES (PVT) LTD

and

KONAK WALLING (PVT) LTD

versus

VENENCIA MADAKE

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 10 March 2011

Mr *F.M. Katsande*, for the applicants

Mr *S. Tsaurai*, for the respondent

CHIWESHE JP: The applicants seek an order declaring the respondent liable for contempt of court. It is proposed that the respondent be committed to prison for a period of thirty days wholly suspended on condition that the respondent and all those claiming through her shall within twenty four hours of this order vacate stand 1089 Tynwald, Harare.

The background facts to this application are as follows. The first applicant and the respondent entered into an agreement in which the first applicant leased stand 1089 Tynwald to the respondent. At some stage during or after the subsistence of the lease, the first applicant sought to evict the respondent from this property. The respondent approached the Magistrates Court and obtained an order interdicting the first applicant from unlawfully evicting her pending the termination of the lease agreement. All the applicants were ordered not to disturb the respondent’s peaceful possession and use of the property.

Displeased with that turn of events, the applicants filed an appeal challenging the magistrate’s decision. The notice of appeal was served on the respondent’s legal practitioners. There are two irreconcilable versions of events that took place after the filing of the notice of appeal. The applicants state that the respondent then forcibly reoccupied the property. This according to them amounted to contempt of court as the appeal so noted would have suspended the magistrate’s decision. It is for this reason that the applicants have filed the present application for contempt of court.

On the other hand the respondent avers that she was always in occupation of the property. The applicants would have evicted her but for the intervention of the Magistrates Court. She denies having abandoned the property let alone using force to reoccupy the same. She states that she was a lawful tenant occupying on a rent to buy basis. She had previously bought other properties from the first applicant on a similar rent to buy basis.

These two versions disclose serious disputes of fact which cannot be resolved on the papers as they stand. In that regard the present application is ill conceived. It should have been brought by way of action.

In any event I would expect that a reasonable magistrate would have been satisfied before issuing the order that there was an agreement of lease or at least that the respondent was in peaceful and undisturbed possession of the property. Her removal under such circumstances would have required her consent or an order of court. From the papers it is clear that the applicants neither obtained her consent nor a court order. The magistrate’s order did not determine the rights of the parties – those she clearly said should be determined in a different forum in terms of the lease agreement, if any. On paper, I cannot find fault with her reasoning.

There being no other court order to fall back on, what would the parties’ rights be pending appeal? If the respondent was in occupation she would be entitled to remain in occupation pending disposal of that appeal. She would not be held to be in contempt of court.

However, the applicants aver that she had abandoned the property at the time the magistrate issued the interdict against them. As already stated the resultant dispute of fact between the parties cannot be resolved on the papers.

The applicant has also detailed the manner in which it is alleged the respondent breached the lease agreement. The respondent does not agree with those factual averments. In any event such averments would be irrelevant to the present application which hinges solely on whether the respondent was in contempt of court in view of the pending appeal against the magistrate’s decision.

As already pointed out this application cannot succeed. The factual disputes cannot be resolved without hearing *viva voce* evidence.

In the result it is ordered that the application be and is hereby dismissed with costs.

*F.M. Katsande & Partners,* applicants’ legal practitioners

*Warara & Associates,* respondent’s legal practitioners