Judgment No. HB 101/2003
Case No. HC 1645/2003

ANTONIO BATISTA DOS SANTOS

Versus

MANUEL SABRINO DE ANDRADE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 22 AUGUST & 23 OCTOBER 2003

T Hara for the applicant
J James for the respondent

Stay of Execution

CHEDA J: This application is against the writ of execution and subsequent removal of applicant's property by respondent.

The brief history of the matter is that on 17 February 1996 applicant together with his wife one Julieta Gouveia Monteiro Dos Santos acknowledged their indebtedness to respondent in the sum of 16 000 contos (16 million Portuguese Escudos) which translated to Z$1 400 000.00 which was money lent and advanced to applicants in 1989.

On 20 April 1998 respondent issued summons against applicant and his wife for the recovery of the said sum of $1 400 000.00. Applicants entered an appearance to defend. Trial dates were set down for 29 and 30 May 2001 but the trial did not take off resulting in the matter being postponed to 15, 16 and 17 January 2002 as trial dates. On 15 January 2002 applicants' legal practitioners unsuccessfully applied for a postponement resulting in a judgment being granted against them. Applicant then applied for a rescission of judgment which was dismissed on 24 May 2002. On 29 November 2002 respondent applied for and was granted a writ of execution against

applicants for the sum of Z$16 000 000.00 and $305 000. Suffice to say that the debt of $305 000 is admitted and therefore nothing turns on it.

On 2 December 2002 applicant filed an application for condonation for late filing of notice of appeal and a notice of appeal with the Supreme Court. *Mr Hara*'s argument is very simple and straight forward. He argues that applicant has applied for condonation for late noting of appeal and a notice of appeal, therefore, respondent should not proceed with the execution of judgment. On the other hand *Mr James* argues that applicant has been dilatory in his handling of this matter which leaves one with one conclusion, being that applicant's action is designed to frustrate respondent.

I believe that the sole issue here is whether or not in view of applicant's appeal to the Supreme Court, respondent should nonetheless be allowed to proceed with his writ. There are two distinct applications before the Supreme Court. There is an application for condonation for late filing of notice of appeal and a notice of appeal. *Mr James* for respondent argued that respondent should be allowed to execute his judgment on the basis of applicant's lack of interest in pursuing this matter to finality. This is borne out by the fact that applicant previously sought to postpone the hearing on two occasions and has failed to note his appeal timeously. This is a valid argument indeed, but, it lacks to take into account one major aspect pertaining to the applications before the Supreme Court. As long as these applications are pending before the Supreme Court this court in my view has no right to determine the validity of the reasons for such dilatoriness on the part of the applicant.

Mr Dube on the other hand argued that execution should be stayed pending appeal. It is trite law that the execution of a judgment is automatically suspended upon the noting of an appeal, see *De Lange* v *Bonini* 1906 TH 25; *South Cape Corp*

(Pty) Ltd v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD). The Appellant Division made it clear so many years ago that generally the execution of a judgment is automatically suspended upon noting an appeal and cannot be carried out except with the leave of the court which granted the judgment. It should also be noted that to obtain such leave, the party in whose favour the judgment was given must make a special application.

In fact this is our common law position see *Reid & Another* v *Godart & Ano* 1938 AD 511 at 513 where De VILLIERS JA stated,

> "The foundation of the common law rule as to the suspension of a judgment on the noting of appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from." See also *Arches (Pty) Ltd* v *Guthrie Holdings (Pty) Ltd* 1989 (1) ZRR 152 (H).

The Supreme Court is yet to determine the validity of the application for condonation, therefore in theory there is no appeal before that court. However, in the circumstances that application has to be dealt with by the Supreme Court first and no other court.

The question therefore is whether having observed that technically speaking there is no appeal before the Supreme Court, this court should then disregard the two applications before the Supreme Court and determine respondent's prayer to execute. It is my opinion that as long as there is an issue for determination by the Supreme Court, this court has no power to entertain an issue the result of which will render the issue before the Supreme Court irrelevant. It is the Supreme Court which is

empowered to determine both applications before it, as they have been filed. The question of whether applicant has complied with the rules and procedures of noting an appeal is the domain of the court to which the appeal has been noted and certainly not this court.

For the reasons stated above this application succeeds with costs.

Moyo-Hara & Partners applicant's legal practitioners
James, Moyo-Majwabu & Nyoni respondant's legal practitioners