Judgment No. HB 115/2003
Case No. HC 1500/2003
X Ref HC 1245/03, 1306/03 &
1394/03

KOULLOUROS KYRIAKOS

And

TUMAZOS KYRIAKOS

Versus

SONNY KUZOMUNHU CHASI & 64 OTHERS

And

THE DEPUTY SHERIFF

And

OFFICER IN CHARGE, SAUERSTOWN POLICE STATION

And

OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE – BULAWAYO PROVINCE

IN TE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 31 JULY & 6 NOVEMBER 2003

S Mazibisa for the applicants
H Shenje for the 1st to 64th respondent
65th respondent in person
66th respondent in person

Judgment

NDOU J: On 26 June 2003 CHEDA J ruled in favour of the applicants in HC 1245/03 and ordered against 1st to 64th respondents in the following terms:

"Terms of the final order sought

1. That the provisional order granted in this court interdicting all the respondents from entering Goldman Syndicate Mine situate at Umguza District and barring all the respondents from entering (sic) with running of the mine be and is hereby confirmed.

2. That all the respondents jointly and severally be and are hereby ordered to pay costs of suit on an attorney – client scale.

Interim Relief Granted

Pending the finalisation of the matter, the applicants be granted the following relief:

1. That the first and second respondents and their organisation be and are hereby interdicted from entering Goldman Syndicate Mine, from harassing the applicants' authorising any letters to them and interfering with the day to day running of the mine by the applicants or their agents.
2. That the 3rd respondent up to the 63rd respondents be and are hereby interdicted from entering Goldman Syndicate and from harassing the applicants and their employees and from interfering with the day to day running of the mine by the applicants or their agents.
3. All the respondents be and are hereby ordered to vacate Goldman Syndicate Mine located in Umguza District within 24 hours of service of this order failing which the Deputy Sheriff together with the Officer In Charge for Sauerstown Police Station and/or any of his assignees be ordered to forcibly evict the respondents and their accomplices."

On 4 July 2003 the first 64 respondents noted an appeal against the judgment of CHEDA J based on the following two grounds.

"1. The learned judge erred in finding as a fact that the appellants had no right to remain in the premises.
2. The learned judge erred in granting an order for eviction without hearing the appellants."

The noting of the appeal by the first 64 respondents automatically suspended the execution of the judgment appealed against unless this court directs otherwise. In fact the operation of an order such as in an interim or final interdict, is suspended by the noting of the appeal, not merely the process of execution – *Zaduck* v *Zaduck* 1966(1) SA 550 (SR); *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534(A); *Du Randt* v *Du Randt* 1992 (3) SA 281 E and *Masukume* v *Mboma and Ano* HB-46-03.

The applicants have now approached this court by way of special application for leave to execute the judgment pending the appeal. As pointed out above the common law rule is that the noting of the appeal automatically suspended the execution of the judgment. What the applicants seek is the exception to this rule.

In *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd supra* at page 545D-F CORBETT JA aptly stated the factors to which a court would have regard in exercising its discretion in considering an application for leave to execute. After stating that the court had a wide general discretion to grant or refuse leave and, if leave granted, to determine the condition upon which the right to execute should be granted, he said –

> "In exercising this discretion the court should, in my view, determine what is just and acquitable, in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:
> 1. the potentiality of irreparable harm and prejudice being sustained by the appellant on appeal if leave to execute were to be granted.
> 2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused;
> 3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or harass the other party; and
> 4. Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

These views were approved in our jurisdiction – *Dabengwa & Ano* v *Minister of Home Affairs & Ors* 1982(1) ZLR 223 (HC); *Van T'Hoff* v *Van T'Hoff & Ors* 1988(1) ZLR 335 (HC); *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989(1) ZLR 152 (HC); *Lincoln Court (Pvt) Ltd* v *ZDECO (Pvt) Ltd* 1990 (1) ZLR 158 (HC) and *ZDECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (HC).

In the latter case SMITH J emphasised the context within which this rule operates. I agree with these words of caution which the learned judge stated –

> "While I accept that the court has a wide general discretion as mentioned in the cases I have referred to above, the court should always have regard to the views so ably expressed by LEWIS J (as he then was) in *Wood NO* v *Edwards & Ano* 1966 RLR 335 at 340:
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> "The learned judge, JANSEN J, in the Ruby's Cash Store case, suggested that the matter might be treated on the same basis as an application for leave to appeal. The court should ask itself: has the applicant any reasonable prospects of success? That may well be the position where no question of irreparable loss arises by allowing the execution where, for instances the judgment sounds in money and the appellant can be safeguarded by an order for security *de restituendo*. The question of whether or not execution should be ordered would depend on whether or not there are any reasonable prospects of success on appeal. But, in a case where the whole object of the appeal would be completely defeated if execution were to proceed, then it seems to me that this court has no right to deal with the matter on the basis of whether or not there is a reasonable prospect of success on appeal.
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> The opposition is this: that the appellant has an absolute right to appeal, and to test the correctness of the judgment appealed from in the Appellate Division, and if, by ordering execution the whole object of the appeal would be stultified, then this court would in effect be usurping the functions of the appeal court if it ordered execution merely on the basis that it thought, in its opinion, that the prospects of success were slight. It seems clear, from the authorities, that it is only where the court is satisfied that the appeal is not brought genuinely with the *bona fide* intention of testing the correctness of the judgment in the court below, but is only brought as a delaying tactic and as a means of staving off the evil day, that the lower court may order execution to proceed in such circumstances."

Briefly, the facts are the following:

The applicants are business partners operating a partnership under Goldman Syndicate Mine which is situated in Umguza area of Bulawayo. The mine concentrates on gold mining, processing and selling. The 1st and 2nd respondents are father and son respectively running an organisation called SKC Consulting Services t/a Manifest Security Services and Zimbabwe Indigenous Economic and Mines

Action Group located at 21 Fort Street, Bulawayo. It is not clear whether they represent the other 63 respondents as "consultants" or as an "action group".

The other respondents (with the exception of the Deputy Sheriff and Police respondents) are all former employees of the applicants. On 31 May 2003 they all sought to be paid their retrenchment packages. They were paid by way of bank cheques which they encashed at National Merchant Bank. These respondents invited and were represented by the Zimbabwe Federation of Trade Union (ZFTU) during the negotiations of the said retrenchment packages. All this time the 1st and 2nd respondents, who were not employed by the mine, were up and about spewing various allegations of fraud, racism etc against the applicants and members of their management team. They wrote letters to the Reserve Bank and the President's Office about their concerns. The retrenchment packages were calculated and agreed upon by the 3rd to 64th respondents, the applicants and ZFTU. Upon receipt of their dues each one signed an acknowledgement phrased as follows:

> "Confirmation of receipt of all my dues paid to me by Goldman Syndicate as a package, which includes leave days, holidays, overtime, backpay, notice, severance. … I do hereby sign for the receipt of all my money in cash/cheque and promise to vacate the premises soon …"

The matter was finalised and the 3rd to 64th respondents vacated the mine. Thereafter the 1st and 2nd respondents came into the fray and held meetings with 3rd to 64th respondents. In a nutshell they accused the applicants of economic sabotage. On 21 June 2003 the 1st and 2nd respondents "evicted" the applicants and their employees from the mine. This gave rise to the application in HC 1245/03 which was granted *ex parte*. The respondents approached this court and sought a stay of execution of the

order made in HC 1245/03. In case number HC 1306/03 CHIWESHE J on 22 July 2003 dismissed the application with costs on the basis that the 1st and 2nd respondents lacked the requisite *locus standi in judicio*. What is clear is that the 3rd to 64th respondents entered into an agreement with the applicants i.e their employer witnessed by a trade union of their choice. They reduced their agreement to writing. On advice of 1st and 2nd respondents they wanted to resile from the written agreement. Instead of approaching the courts for remedy they went back to the mine and forced the applicants from their property. They took the law into their own hands. Their action does not amount to a lawful way of resiling from a written agreement. The applicants approached the courts for relief. They succeeded and the respondents made a valiant attempt to stay execution of that order. Having failed they noted the appeal. Looking at the notice of appeal there are no prospects of success. The appeal was not noted with *bona fide* intention of seeking to reverse the judgment but for some indirect purpose. It is noted to gain time and harass the applicants from their lawfully acquired property. Their purpose is to unlawfully stop the applicants from their mining operations. If the 3rd to 64th respondents are not satisfied with the retrenchment packages this country has a sound labour regime to address to those concerns. There is the Labour Tribunal and the Labour Court created for such labour disputes. Self-help cannot be understood in such a situation. Court processes should not be used to advance lawlessness. The balance of hardship best favour the applicants. I find that the applicants made a case for the granting of the application in accordance with the demands of the preponderance of equities.

I accordingly grant special leave to the applicants to execute their order in the HC 1245/03 in terms of the draft.

Cheda & Partners, applicant's legal practitioners
H Shenje & Partners 1st and 64th respondent's legal practitioners