Judgment No. HB 46/2003
Case No. HC 2971/2002

NELSON MASUKUME

Versus

S H S MBONA, ACTING PRINCIPAL
OF UNITED COLLEGE OF EDUCATION

And

UNITED COLLEGE OF EDUCATION

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 31 DECEMBER 2002 & 27 MARCH 2003

K Ncube for the applicant
C P Moyo for the respondents

Urgent Chamber Application

NDOU J: The applicant is a registered student at the second respondent while 1st respondent is the acting Principal of 2nd respondent. On 9 May 2002 the applicant was charged with an act of indiscipline it being alleged that on 6 May 2002 he had written a letter to *The Chronicle* newspaper wherein he highlighted a shortage of drugs at 2nd respondent's clinic. Applicant was charged before disciplinary hearing pursuant to the provisions of section 9(4) of the Manpower Planning and Development (Government Teachers' Colleges & Technical or Vocational Institute Regulations, 1999 published in Statutory Instrument 81 of 1999. The hearing found him guilty. He was not satisfied with that outcome and he unsuccessfully appealed. He then launched an application to this court in case number HC 2208/02. This court in HB-140-02 ruled in his favour and ordered in the following terms:

"1. That the suspension from 2nd respondent of the applicant be set aside.
2. That 1st and 2nd respondents arrange a proper hearing of the applicant's case.
3. That costs of this application be borne by the 2nd respondent.

The respondents, in turn, appealed against this decision. The noting of the appeal by the 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 – see *South Cape Corporation (Pty) Ltd* v *Engineerin, Management Services (Pty) Ltd* 1977(3) SA 534 (A); *Du Randt* v *Du Randt* 1992 (3) SA 281 (E) at 289 A; *Zaduck* v *Zaduck* 1966 (1) SA 550 (SR) and *The Civil Practice of the Supreme Court of South Africa* 4th Ed – Van Winsen, Cilliers and Loots at page 889.

The applicant has now approached this court by way of special application for leave to execute the judgment pending the appeal. Although the applicant has not categorically stated so in his application, in essence, that is what he seeks in this court as *Mr Moyo,* for the respondents, rightly pointed out. Execution of judgment pending appeal is by way of an exception to above-mentioned common law rule. In *Leask* v *French and Ors* 1949 (4) SA 887 (C) at 893 SEARLE J stated the rule as follows:

> "In every case of an order of court *ad factum praestandum* there must be a serious risk of prejudice to one or other party in the event of an appeal. If execution is authorised and the appeal succeeds it is seldom, if ever, possible to restore the full *status quo ante*, whereas on the other hand if execution is stayed and the appeal ultimately fails the successful party, through the delay, generally suffers a loss for which he cannot be compensated. In the circumstances the court can only reduce to a minimum the possibilities of prejudice by granting or refusing the application in accordance with demands of the preponderance of equities."

In *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd (supra)* at page 545D-F CORBETT JA enunciated 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 tight to execute should be granted, he said –

> "In exercising this discretion the court should in my view, determine what is just and equitable, in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) 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 the 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 hardships or convenience, as the case may be."

These views have been cited in our jurisdiction – *Dabengwa and Ano* v *Ministry of Home Affairs & Ors* 1982 (1) ZLR 223 (HC), *Jeremy Prince (Pvt) Ltd* v *Owen and Ano* HH-14-86; *Van T' Hoff* v *Van T' Hoff & Ors* 1988 (1) ZLR 335 (HC); *Legal and General Assurance of Zimbabwe (Pvt) Ltd* v *BG Insurance (Pvt) Ltd* HH-190-89, *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt)* 1989 (1) ZLR 152 (HC), *Lincoln Court (Pvt)* v *Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd* 1990 (1) ZLR 158 (HC); *Electrical and Furniture Trading Co (Pvt) Ltd* v *M & N Technical Services (Pvt) Ltd* HB-39-91 and *ZDECO (Pvt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61. In the latter case SMITH J emphasised the context in which this rule operates. I agree with this qualification. The learned judge admirably stated on pages 64C-65A,

> "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 N O* 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 instance, the judgment sounds in money and the appellant can be safe guarded by an order for *security de restituendo*. Then 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 prospects 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 Appellant 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 though, 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."

In this case the respondents have not satisfied that the object of the appeal would be completely defeated if the application were granted. Their fear is that if the application is granted this may encourage ill discipline on the 2nd respondent's campus. This is not irreparable damage. On the other hand if the application is not granted the applicant will suffer considerable and it would be difficult, if not impossible to restore the *status quo ante* if the respondents' appeal were unsuccessful. He will not be able to pursue his career as a teacher for a year. He has been allocated a school and a grade to teach for the year 2003 on condition that he submits his results. If the applicant loses his place it will take a term or more before he gets

alternative placing. This will be a period spent without income when at the same time he is expected to start servicing his education loan with the Metropolitan Bank. The balance of hardships best favours the applicant. I find that a case has been made for the granting of the application in accordance with demands of the preponderance of equities.

I accordingly grant the application in terms of the amended draft order.

Cheda & Partners, applicant's legal practitioners
Messrs Majoko & Majoko, respondents' legal practitioners