

**MAKEH ENTERPRISES (PVT) LTD**

**Versus**

**KAISER ENGINEERING (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 2 AND 9 SEPTEMBER 2004

*V Majoko* for the applicant  
*B Longhurst* for the respondent

Judgment

**CHIWESHE J:** In this application the applicant seeks leave to execute pending appeal the judgment granted in its favour under case number HC 1461/04 on 3 August 2004. The provisional order sought reads as follows:

“Terms of final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

- (a) Pending final determination of the dispute as between applicant and respondent in case number HC 1461/04 the order of this court handed down on 3 August 2004, shall remain in full force and effect. For avoidance of doubt, the leased premises, being stand 6249A Bulawayo Township shall remain closed to the respondent and until final determination of case number HC 2580/04.
- (b) Respondent pays the costs of this application.

Interim Relief granted

That pending final confirmation of the provisional order:

1. Pending determination of this application and upon service of this application and provisional order, the ruling in case number HC 1461/04 shall continue to be operative and the premises the subject matter of this application, being stand 6349A Bulawayo Township, shall remain closed and the property as inventoried by the Deputy Sheriff shall remain under attachment.”

The background facts to this application are as outlined in the judgments handed down under case number HC 545/03 and under case number HC 1461/04 which judgments I incorporate herein by reference.

It is trite that the noting of an appeal has the effect of suspending the operation of the judgment appealed against. Such judgment can only be executed with the leave of the court that granted it. The discretion to grant such leave clearly rests with the court that granted the order or judgment appealed against. In the exercise of that discretion regard must be had to such factors as the prospects of success in the appeal lodged, whether the grant of such leave would result in irreparable harm to the appellant's interests in the event that the appeal succeeds, whether the judgment appealed against sounds in money and whether furnishing of security would in the circumstances be sufficient safe guard of either party's interests.

In the present matter the interests of the parties manifest themselves in two matters. Firstly, there is the interest of the applicant in seeking to recover rent owed to it by the respondent. In this regard an action has been instituted in this court under case number HC 2580/04. In it the applicant seeks to recover arrear rentals dating back to May 2001 in the sum of \$133 071 000,00 which sum the applicant avers represents reasonable rentals for its property over the period in question. Whatever

the outcome of that action, the remedy if granted, will sound in money. In order to safeguard this interest the applicant sought and was granted an order attaching the respondent's property and closure of the rented premises pending disposal of the action. It is that order that is being appealed. The applicant argues that the respondent owes it rentals and that in the past, the respondent had failed to pay rentals to the previous landlord. It was the applicant which had rescued the respondent by paying such rentals on its behalf. There is no basis according to the applicant for holding that the respondent commands sufficient resources to meet the claim in the action should the applicant succeed. In my view there is merit in that assertion. Firstly, the respondent has not demonstrated that it commands any significant financial resources. All it has done is tender payment of rentals based on the rates applicable in the original lease in 2001, a paltry \$20 000,00 odd per month. Given the rate of inflation over the years there is no doubt whatsoever that that figure no longer represents a fair and reasonable rental for the premises. In the same vein the respondent has not offered any security whatsoever to allay the applicant's fears that any judgment it may obtain will be rendered a *brutum fulmen*. The only security that the applicant has is the attached property. The applicant is averse to allowing the respondent access to the premises housing the attached property because of the apprehension it harbours that the respondent may remove or dispose of the attached property. Property has previously been removed from the premises to another company in which the directors of the respondent have an interest.

On the other hand the respondent's interest lies in the need for it to continue its business operations and save jobs. This interest is reflected in the pending appeal against the order attaching its equipment and authorising closure of the rented

premises. It is argued that the *status quo* will cause irreparable harm to the respondent in the event that the appeal succeeds.

The respondent's case is without merit. Firstly, it is accepted that it owes rentals to the applicant the quantum of which is however subject to determination. It must also be accepted that in determining that quantum the trial court would endeavour to arrive at a reasonable rental for the rented premises. It is unlikely that the trial court would hold that a fair rental is one that is calculated solely on the rates applicable three years ago, given the hyper inflation that characterised the economy during the period in question. A much higher figure than is averred by the respondents will no doubt be payable. When that happens, naturally the applicant will want to be assured that its claim will be met. The respondents are unable to give that assurance by way of security. There is no security available to the applicant other than the attached property. For this reason any harm, irreparable or otherwise, that the respondent may suffer is entirely of its own making. It must provide security or face the consequences. For the same reason there are no prospects of success in the appeal that the respondent has lodged with the appeal court. One is tempted to conclude that the appeal has been lodged purely for purposes of delay and convenience.

In the circumstances the application must succeed. It is ordered that the application be and is hereby granted in terms of the draft provisional order.

*Messrs Majoko & Majoko* applicant's legal practitioners  
*Ben Baron & Partners* respondent's legal practitioners