Judgment No. HB 68/2004
Case No. HC 1477/04
X Ref HC 1359/02 & HC 2233/02

DAVIES SUNGANAI MAFURIRANO

Versus

THOKOZANI KHUMALO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 6 AND 20 MAY 2004
C P Moyo for applicant
E E Marondedze for respondent

Urgent Chamber Application

NDOU J: In HB-11-04 my brother OMERJEE J and I ruled in favour of the applicant against the respondent. Briefly the applicant seeks an order to permit him to execute upon a judgment that he originally obtained in Bulawayo Magistrates' Court, which was subsequently confirmed by this court on appeal by the respondent in the aforesaid HB-11-04. The respondent, pursuant to a written lease agreement with the applicant, was a tenant at 378 Gore Ridge Road, Killarney, Bulawayo. The lease started in May 2001. In September 2001 the respondent stopped paying his rentals resulting in litigation instituted by the applicant against him. The applicant obtained a default judgment against the respondent in the said Magistrates' Court. The respondent unsuccessfully applied for rescission of the said judgment. He appealed against the dismissal of his application for rescission to this court. In HB-11-04 he was unsuccessful as I have already alluded to. His quest for justice was not, however, quenched resulting in a further appeal to the Supreme Court. The respondent attacks the appeal judgment of this court on the basis that the issue of wilfulness, was not relevant to the appeal. The respondent alleges in his notice of appeal, without any proof, that there was an agreement that the respondent was not in wilful default.

Nowhere in the record of the proceedings in the Magistrate's Court is there such an agreement. In any event, in his heads of argument and submissions made in court the applicant's legal practitioner made the issue of wilfulness a major one. The respondent also makes an allegation that is not supported by the record filed in this court that trial magistrate found that he (i.e. respondent) was not in wilful default. There is no such finding. On these two material points in his notice of appeal the respondent seeks to mislead the Supreme Court. The foregoing points have to be taken into account in determining the fate of this application. They will be considered to determine whether respondent is *mala fide* and whether the appeal is frivolous, vexatious and is noted not with the *bona fide* intention of seeking to reverse the judgment but to gain time. The other points raised by the respondent in his notice centre around the questions which were adequately canvassed in HB-11-04. The respondent has not referred to any authorities that go against those cited in HB-11-04.

The noting of appeal by the respondent automatically suspended the execution of the judgment appealed against unless this court directs otherwise. The operation of the order of the Magistrates' Court, Bulawayo and not merely the process of execution is suspended by the noting of the appeal. *Kyriakos and Ors* v *Chasi and Ors* HB-115-03, *Zaduck* v *Zaduck* 1966(1) SA 550 (SR) and *Du Randt* v *Du Randt* 1992 (3) SA 281 (E).

The applicant has now approached this court by way of special application for leave to execute the judgment pending appeal. This court has a discretion in an application of this nature. This is a wide general discretion. The factors which the court would have regard in exercising this discretion are-

(a) the potentiality of irreparable harm and prejudice being sustained by the appellant on appeal if leave to execute were to be granted.

(b) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused;

(c) The prospect 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 to harass the other party; and

(d) 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 – *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534A at 545D-F, *Dabengwa & Ano* v *Minister of Home Affairs & Ors* 1982 (1) ZLR 223 (HC); *Lincoln Court (Pvt) Ltd* v *ZDECO (Pvt) Ltd* 1990 (1) ZLR 158 (HC). However, 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 Supreme Court if it ordered execution merely on the basis that is thinks, in its opinion, that the prospects of success are slight – *Wood NO* v *Edwards & Ano* 1966 RLR 335 at 340 and *ZDECO (Pt) Ltd* v *Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (HC).

I have already highlighted that on the question of wilfulness the respondent's notice of appeal is misleading. First, it is alleged that the parties agreed that the

respondent was not in wilful default. There was no such agreement, in fact, the applicant submitted that the respondent was in wilful default. Even in the heads of arguments and submissions during the appeal hearing the applicant canvassed this aspect in detail. It is not correct that there was an agreement. There is absolutely no evidence of the existence of such an agreement. The respondent also states that the trial magistrate ruled that he (i.e. the respondent) was not in wilful default. There was no such finding in the record of proceedings of the trial court.

These untruths in the notice of appeal clearly show that the appeal is not brought with a *bona fide* intention of testing the correctness of the judgment in HB-11-04, but is only brought as a delaying tactic and as a means of starving off the evil day.

On the question of law the respondent is challenging the correctness of the finding that, as a tenant he was not in a position to dispute the title of the person from whom he derives his right of occupation. He has not cited any authority in support of his position to counter the several authorities referred to in the judgment to justify the court's findings in this regard – *Frye's (Pty) Ltd* v *Reis* 1957 (3) SA 575 (A) and *Shell Rhodesia (Pvt) Ltd* v *Eliasov NO* 1979 (3) SA 915 (R).

Further, the respondent attacks the quality of his legal representation during the appeal hearing. Admittedly there were concessions made by his erstwhile legal practitioner but the appeal judgment was not based on such concessions. In the circumstances the question of such concessions is neither here nor there. The balance of hardships or convenience are in favour of the applicant. The applicant has not received a cent for the property from September 2001 to date. He, nevertheless, continues to pay rates and taxes for the property. The respondent has without consent

made extensive alterations to the property. He made all these alterations whilst the matter was pending before the courts. In light of the above I am satisfied that the applicant made out a case for the relief sought.

Accordingly, I grant the provisional order in the following terms:

Terms of Final Order Sought

It is ordered:

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

(a) Respondent be ordered not to interfere with the occupants of 378 Gore Bridge, Killarney.

(b) Respondent pays the costs of this applications on legal practitioner and client scale.

Interim Relief Granted

That pending the final confirmation of the provisional order:

1. Execution of the judgment in matter number HCA 97/03 Ref case number 8251/02 be and hereby allowed pending the appeal in case number SC-137-04.

Majoko & Majoko, applicant's legal practitioners
Marondedze, Nyathi, Majome & Partners, respondent's legal practitioners