POTENTIAL INVESTMENTS (PVT) LTD

And

RALEMA INVESTMENTS (PVT) LTD

Versus

JOSEPH TAYALI (in his personal capacity)

AND

TAYALI AND SONS

AND

NERGER PROPERTIES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 MAY, 9 JUNE & 22 SEPTEMBER 2011

Ms H. M. Moyo for applicants
Advocate L. Nkomo for respondents

Urgent Chamber Application

NDOU J: This is a court application for execution of judgment pending appeal. On 4 November 2010, the applicants obtained a judgment in their favour in this court under HB-136-10. The judgment was in respect of two matters, namely HC 1583/07 and HC 2747/07 which had been consolidated. The effect of this judgment was to confirm the provisional order granted to applicants under HC 1583/07 (for *inter alia*, the eviction of the respondents and all those claiming through them from number 70 Jason Moyo Street, Bulawayo and to dismiss the application by the respondents under HC 2747/07).

On 24 November 2010, the respondents noted an appeal against this judgment to the Supreme Court and said appeal is pending under SC 284/10. The respondents have remained in occupation of the property on the basis of the appeal. This application is opposed. It is trite that this court has a discretion to grant an application for leave to execute pending appeal. In exercising its discretion the court takes into account what is just and equitable in the circumstances and particularly the following considerations:

(a) The potentiality of irreparable harm and prejudice to the appellant if leave to execute is granted;
(b) The potentiality of irreparable harm and prejudice to the respondents on appeal if leave to execute is refused;
(c) The prospects of success on appeal including the question as to whether the appeal is frivolous and vexatious or appeal has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some other purpose such as to gain time or to harass the other party.
(d) If the competing interests are equal, then the balance of hardship to the other party – *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534 (A); *Ardes (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H); *Zaduck* v *Zaduck* (2) 1965 RLR 635 (G), 1966 (1) SA 550 (SR); *Masulame* v *Mbona & Anor* 2003 (1) ZLR 412 (H); *Dabengwa & Anor v Minister of Home Affairs & Ors* 1982 (1) ZLR 223 (H); *Van T' Hoff* v *Van T' Hoff & Ors* 1988 (1) ZLR 335 (H) and *Zimbabwe Distance Correspondence Education College (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H).

I propose to consider these issues in turn.

Prospects of success on appeal

HC 1583/07

In this case the court confirmed the provisional order and upheld the applicants' rights to the ownership of the property in terms of the earlier Supreme Court judgment and thus ordered eviction of the respondents. In terms of section 26 (1) of the Supreme Court Act, a judgment of the Supreme Court is final and cannot be revisited. By refusing to move out after the Supreme Court judgment, the respondents were arrogantly defying the judgment of the Supreme Court.

A closer examination of the grounds of appeal will show that they do not address any issued in respect of the part of the judgment pertaining to HC 1583/07. This is notwithstanding the fact that the notice of appeal purports to be in respect of the whole of the consolidated judgment – see Rule 29 (d) and (e) of the Supreme Court Rules. There is also no relief that is sought in the prayer in respect of this part of the judgment. There is no reason why the applicants should continue to suffer deprivation of this property and it is therefore just and equitable that the applicants be allowed to execute the judgment pending appeal.

HC 2747/07

The court dismissed the respondents' application on the grounds that they were seeking relief on a matter which had already been dealt with by the Supreme Court and was therefore *res judicata* – A reading of the draft order under HC 2747/07 will show that the respondents sought to alter paragraph by paragraph the relief that was granted to the applicants when the Supreme Court confirmed the provisional order by its judgment under SC 140-05. By asking the High Court to deal with the matter for the second time, the respondents were asking the High Court to alter the judgment of the Supreme Court. It is trite law that the High Court is bound by decision of the Supreme Court – *Ethnomusicology Trust* v *Deputy Chairman Labour Relations* 1997 (2) ZLR 207 (H); *Ex parte Jones* 1929 CPD 134 at 137 and Hahlo & Khan – *The South African Legal System and its Background*.

In *Ex parte Jones*, *supra*, at page 137 GARDNER JP observed –

> "*Stare decisis* is to my mind a good practical maxim. It is better that the law should be unsound historically than that it should be uncertain. Laymen in their usual commercial transactions wish to have a certain rule of law which they may be guided, and care not whether it can be supported by the niceties of legal argument. To them what matters is that the law has been laid down in a certain way; once it has been so laid down they must follow it. But it concerns them not at all whether it is a correct interpretation of Voet or Averanius."

The Supreme Court upheld the applicants' right of first refusal. Respondents are occupying the property in defiance of the above mentioned Supreme Court order. The respondent are litigants with dirty hands and their appeal is affected by that fact – *Scheelite King Mining P/L* v *Mahachi* 1998 (1) ZLR 173 (H) and *Deputy Sheriff*, *Harare v Mahleza & Ors* 1997 (2) ZLR 425 (H).

Prejudice to the applicants

The applicants have never had access to the premises. The respondents simply refuse to move out. This is notwithstanding the fact that the Supreme Court made a final determination on the matter on 13 November 2006. The Supreme Court's judgment confirmed the provisional order which had been granted three years earlier on 18 August 2003 and confirmed on 24 April 2005. As the respondents continue to occupy the premises the occupational considerations that they owe to the applicants continue to accumulate. Such costs will be substantial considering the fact that they have accumulated over a long period of time. The prospects of recovering the true value of their damages are virtually non-existent. The harm to them is therefore irreparable.

Prejudice to the respondents

The respondents on the other hand stand to suffer no prejudice or harm if leave to execute is granted. The judgment is not one sounding in money and the respondents are, therefore not being called upon to pay any sums of money which they are not likely to recover if paid over to the applicants.

The balance of hardships best favour the applicants. A case has been made by the applicants for the granting of the application in accordance with demands of the preponderance of equities.

Accordingly it is hereby ordered that:

1. The applicants be and are hereby granted leave to execute the judgment of this court under HB-136-10 pending the appeal by the respondents to the Supreme Court.
2. The respondents pay the costs of this application jointly and severally the one paying the other to be absolved on an attorney and client scale.

Joel Pincus, *Konson & Wolhuter*, applicants' legal practitioners
Cheda & Partners, respondents' legal practitioners