

**NATIONAL RAILWAYS OF ZIMBABWE
CONTRIBUTORY PENSION FUND****Versus****EKUTULENE INVESTMENT
t/a WALKERS PUB & RESTAURANT****and****WAYNE ALLEN JONES**IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 23 JANUARY 2017**Opposed Court Application – *Ex tempore****Mrs C. Bhebhe* for applicant
Mrs H. Moyo for respondents

KAMOCHA J: The applicant sought for an order of this court in the following terms:-

“It is ordered that:-

- (1) the applicant be and is hereby granted leave to execute the judgment handed down by this honourable court on the 24th March 2016 and have the respondents and all those claiming occupancy through it evicted;
- (2) respondents to pay costs of suit on an attorney and client scale.”

The applicant made the application under the belief that the appeal had not merit whatsoever and was noted for purposes of buying time. The applicant’s perception was that the respondents had no defence to the matter and have no prospects of success and the appeal was *ipso facto mala fide*.

It then concluded that it was entitled to the order sought. The respondents on the other hand contended that their appeal had merits.

In the first place they stated that they did not occupy the premises at the centre of the dispute. They have been occupied by one Gershom Gara for a very long time with the knowledge of the applicant. When a rent dispute went for arbitration the applicant was dealing with Mr Gara not the respondents. The 1st respondent was not in occupation of the said premises and no longer carried out any business on the said property as it had long vacated the property in 2011. The lease agreement had in fact long expired.

Respondents were emphatic that the 1st respondent was not a tenant anymore and was not in occupation and submitted that it would be factually wrong and legally improper to purport to evict the 1st respondent which was not in occupation of the premises.

They further contended that Gershom Gara did not claim occupation through them. Gara testified to that effect.

A look at the 11 grounds of appeal reveals that they need to be considered by the Supreme Court. Appellants have indeed an absolute right of appeal to test the correctness the High Court's decision before the judgment can be executed.

The decision to determine whether or not the case has merits is a preserve of the appeal court. There was no basis, in my view, for suggesting that the appeal was for the purpose of buying time and was therefore *mala fide*.

In the result the application is dismissed with costs.