

HC 1818/02  
FAYE TRUST  
versus  
MOSES ZHANJE  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
SMITH J,  
HARARE, 10 and 17 April, 2002

Mr *H Shenjefor* applicant  
Mr *P Nhererefor* first respondent

SMITH J: The applicant (hereinafter referred to as "the Trust") has applied for an interdict to prohibit the 1st respondent (hereinafter referred to as "Zhanje") from selling a certain piece of land in Greendale (hereinafter referred to as "the Property"). The background to the application is as follows. Zhanje is the registered owner of the Property. On 6 May 2000 he sold it to the Trust. The Trust paid the deposit on the signing of the agreement of sale but failed to pay the balance of the purchase price when called upon to do so. It was placed in *mora* and given notice of cancellation but the balance of the purchase price was still not paid. Zhanje then cancelled the sale. He then instituted an application seeking confirmation of the cancellation and the eviction of the family that was occupying the Property - case No HC 3840/01. The order sought was granted by BLACKIE J on 6 November 2001. An appeal was noted on 19 November. The appeal had the effect of suspending the order granted by BLACKIE J. Zhanje then filed an urgent application for leave to execute pending the appeal - case No HC 11197/01. That application was opposed. On 14 December 2001 GOWORA J granted leave to execute. The present application was then filed on 25 February this year.

Mr *Shenjes* submitted that the order sought should be granted. The Trust has a *prima facie* right or interest in the Property and, pending the determination of the appeal, Zhanje should be precluded from selling the Property. Once the Property was sold the Trust would suffer irreparable harm. The Trust is seeking an interdict *pendente lite*, the requirements for which are well settled - see *Setlogelov Setlogelo* 1974 AD 221 and *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S). The Trust bought the Property for \$3 million and Zhanje has now sold it for \$17 million. If that sale is allowed to go through and the appeal against the order of BLACKIE J is successful, the Trust is unlikely to be able to get compensation for its loss. On the other hand, Zhanje will not suffer any prejudice if the appeal is not successful because he will be able to go ahead with the sale of the Property. The balance of convenience is clearly in the Trust's favour. The Court's discretion, which was mentioned in *Watson v Gilson Enterprises & Ors* 1997(2) ZLR 318 (H), should be exercised in favour of the Trust.

Mr *Nherere* argued that the relief sought by the Trust in *casu* would reinstate the effect of the noting of the appeal against the order of BLACKIE J. When GOWORA J granted leave to execute, she must have been satisfied that the prospects of success on the appeal were remote. In effect, this Court is now being asked to reconsider her ruling. The Trust should have appealed against the order granted by GOWORA J instead of instituting this application. Leave would have had to be obtained before such an appeal could be noted - see *Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) and *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H). As

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GOWORA J has already determined that the Trust's prospects of success on the appeal are remote, the issue cannot be revisited because of the doctrine of issue estoppel - see *Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) Ltd* 1996 (1) ZLR 415 (S). As regards the prospects of success on appeal, the papers filed in case No HC 3840/01 clearly demonstrate that the Trust had failed to pay the balance of the purchase price or to raise a loan to enable it to do so. Moreover, even if the Trust were successful on appeal, the damages it would obtain would be an adequate remedy. Mr Nhererewent on to argue that Zhanje should be awarded costs on the higher scale as this application was filed purely for the purpose of causing delays whilst the beneficiaries of the Trust remained in occupation. It constitutes an abuse of the process of the law.

It is the rule in Zimbabwe that the effect of noting an appeal against a judgment is to suspend that judgment pending the outcome of the appeal. That used to be the rule in England but the position has now been changed. Thus, where a court in England hands down a judgment, the judgment takes effect immediately but the unsuccessful party may then apply to court to have the judgment suspended. The Law Development Commission, in its Report No 34 of 1994, made the proposal that our law on this issue should be amended to bring it into line with the law in England. The reason why the proposal was put forward was expressed as follows at p 4 of the report -

“if a party has obtained the judgment of a court of law, which is an institution that has been set up under our system of justice to make determinations, then prima facie that party should be entitled to the benefit of the judgment and the unsuccessful party should have to seek leave for the judgment to be suspended if an appeal is noted and he should be required to show that special circumstances exist which justify suspension.”

It was further submitted in the report that the equities favour the English approach and that the present system encourages the losers to appeal simply in order to buy time. If the system was changed in the manner proposed, it would mean that the party who loses in the first instance would not simply appeal, but if he wants execution of the judgment to be suspended, he could have to apply therefor and make out a good case.

I would recommend that consideration be given to adopting the proposals set out in the report.

Be that as it may, the position now is that any judgment handed down by a court is suspended once an appeal is noted. However, the successful litigant is entitled to apply to court for leave to execute the judgment. That is what happened in this case. Leave to execute the judgment was granted by GOWORA J. In considering the application for such leave the learned judge would have had to inquire into factors such as the potentiality of irreparable harm being suffered by either party and, if by both, then

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the balance of convenience; the prospects of success on appeal; whether the appeal is frivolous or vexatious - see *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H), *Whata v Whata* 1994 (2) ZLR 277 (S) and the *Econet*, *supra*. Clearly she was satisfied that Zhanje had better prospects of success on the appeal or else she would not have granted leave to execute. As Mr Nherere pointed out, this is not an application by the Trust for an interdict *pendente lite*, where the applicant merely has to establish that he has a *prima facie* right, even though open to some doubt. In this case BLACKIE J, after hearing the parties, determined that the Trust had no rights in the Property, since the sale had been validly cancelled, and GOWORA J has determined that the Trust's prospects of success on appeal are minimal.

Mr Shenje argued that the issue before this court differs from that under consideration by GOWORA J, which was case No HC 11197/01. In that case Zhanje was seeking the eviction of the beneficiaries of the Trust and that was effected. Now, however, the Trust is merely seeking an interdict preventing Zhanje from selling the Property. In my view, the relief sought by the Trust would, if granted, reinstate the effect of the noting of the appeal. BLACKIE J held, in case No HC 3840/01, that Zhanje had validly cancelled the sale of the Property. That means that Zhanje is entitled to sell the Property to another buyer. The fact that he sold it on 6 May 2000 for \$3 million and then was able to sell it, less than 2 years later, for \$17 million shows how the value of the Zimbabwe dollar has plunged in that period.

The question of whether or not the judgment of BLACKIE J should be suspended has been determined by a court of competent jurisdiction. By virtue of the doctrine of issue estoppel, this court cannot revisit that issue - see the *Willowvale Mazda Motor Industries* case, *supra*, and *Galante v Galante* HH 31-2002.

As regards costs, I can see no justification for ordering that they be awarded on the higher scale.

The application is dismissed with costs.

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*Ziumbe & Mtambanengwe*, legal practitioners for applicant

*Gill, Godlonton & Gerrans*, legal practitioners for 1st respondent