

Ref HC 13541/91
SOUTHDOWN HOLDINGS LIMITED
versus
JOSEPH MARIWA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 8 October, 2003

Mr E W Morris for the applicant
Mr Gasa for the respondent

HUNGWE J: This is an application for summary judgment. Applicant is plaintiff in HC 13541/99 where it issued Summons against the present respondent, defendant in that earlier case, seeking an order confirming defendant's right to occupy the principal residence at Roscommon Estate, Chipinge, with effect from 20 February 1999 in terms of due process that culminated in the order declaring respondent lawfully dismissed from his employment with applicant. Applicant also sought an order of ejection of the defendant from that principal residence at Roscommon Estate, payment of holding over damages of \$1 000 per month from 13th August, 1999 to date of vacation or ejection as well as costs of suit.

When respondent entered an appearance to defend, the applicant filed this application for summary judgment.

The application arose out of a series of hearings beginning with an inquiry by the applicant as employer into allegations that the respondent, its employee, had wilfully disobeyed a lawful order for the return of a stove. He lost in that hearing. He appealed to the relevant appellate authority in terms of the Code and again lost. He then noted an appeal with the Labour Relations Tribunal. He lost again.

In the meantime, he continued to occupy the company house. The company grew impatient with respondent and sought an order confirming that respondent's right to reside ended when he (the respondent) was confirmed lawfully discharged from employment. The discharge from employment was produced by the appellate authority in terms of the Code of Conduct in place at his place of employment.

He took the point that once he had the decision of the Labour

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Relations Tribunal, that step had the effect of suspending the judgment under appeal. Further, applicant ought to have, if it intended to execute the judgment under appeal, approached the Labour Relations Tribunal for leave to execute that judgment.

In support of the argument advanced against the grant of the order sought, reliance was placed on *Phiri and Others v Industrial Steel and Pipe (Private) Ltd* 1996(1) ZLR 45(S) and *Mushaishi v Lifeline Syndicate & Anor* 1991(1) ZLR 284 (H).

The lodging of an appeal suspends the operation of the judgment appealed against. That is in the public law domain. Judgment can only be executed pending appeal only with the leave of court which gave the judgment.

The point which is then made in support of the respondent's contention is that as this is not the court which granted the judgment under appeal, the applicant has approached a court which has no jurisdiction to entertain the matter. That being so the application for summary judgment should fail.

In *Vengesayi and Others v Zimbabwe Glass Industries Ltd* 1998(2) ZLR 593(H)

GILLESPIE J had reason to discuss the point whether an appeal from an administrative tribunal had the effect of suspending the decision of that tribunal pending the appeal. After a view of the authorities especially the decision of CORBETT JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1979(3) SA 543 he came to the conclusion that the grant or withholding of a stay of execution is, at common law a matter of discretion reserved to a court in which such a discretion is reposed and that in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgment pending an appeal from that authority, such discretion cannot exist (at p 599A-B). It cannot order the suspension of its own judgment pending an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where the enabling

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statute provides for the situation. He however also accepted that his conclusion did not mean that a person aggrieved by a decision of judgment, or administrative which is not covered by any enactment providing for its suspension pending appeal, and who wishes to appeal and whose prospects of success are sufficient, is left without remedy as he can approach this court to move the appropriate order of stay or interdict.

I take this passage as authority for the proposition that where a party seeks to execute a judgment of an administrative authority or tribunal but the enabling statute does not provide for the suspension pending an appeal, the party may seek to make an appropriate application for such leave court. If that reading is correct then it follows that one must first examine the statute and determining the status of the judgment under appeal.

It seems to me however that the present matter can be distinguished from the matters

In the present case the question that fell for decision is whether the fact that respondent is appealing the decision of the Labour Relations Tribunal in the Supreme Court be a complete bar to

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Code Of Conduct.

The decision appealed against is one made by his employer in terms of a Code of Conduct. has appealed that decision in the Labour Relations Tribunal and lost. He has taken his appeal to the Supreme Court. It seems to me that when the applicant seeks the eviction of the from its residence, it bas s that t not on the decision of the Labour Relations Tribunal but on th decision made in terms of the registered Code of Conduct.

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The respondent is in the same position as the respondent in *UTC (Zimbabwe) (Pvt) Ltd v Chigwedere* 2001(1) ZLR 147(S) here an appeal is one for the decision made in terms of the Code of Conduct the matter is one of private law. It cannot be equated with a ministerial decision or a decision made by a labour relations officer or the Labour Tribunal

A decision made in terms of the Code of Conduct is not suspended by an appeal to the Labour Relations Tribunal. The question is would it then be suspended if an appeal is made from that Tribunal to the Supreme Court?

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One must examine the exact substance of the appeal in order to determine is being appealed against. It seems to me that where the appeal is essentially against the determination by the employer acting in terms of the Code of Conduct, the same reasoning as applied in *UTC* case *supra* should obtain.

That this must be appears to be reinforced by the fact that the issue before me now is unlikely to be ever resolved in his favour as the employer will still exercise his right and pay damages in the event that respondent is successful in the appeal. As a matter of private law an appeal to the Labour Relations Tribunal or the Supreme Court does not bar the appellant's eviction from the applicant's residence.

Because the right to reside in the principal residence at Roscommon Estate was one of those benefits attached to respondent by virtue of the employment with applicant, the moment his contract of employment terminated, so did his right to reside in the residence at Roscommon Estate. ☉

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There will be the following order for summary judgment as follows -

- (a) an Order confirming Defendant's right to occupy the principal homestead at Roscommon Estate, Chipinge terminated with effect from the 20th February 1999 in accordance with the particulars of claim Annexure "A" hereto.
- (b) An Order ejecting the Defendant from the principal homestead on Roscommon Estate Chipinge.
- (c) Payment in the sum of \$5 000,00 damages per month or part thereof in respect of Defendant's unlawful occupation and holding over

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calculated from the 13th August 1999 to the date upon which Defendant vacates or is ejected from the principal homestead of Roscommon Estate, Chipinge.

(d) Costs of suit.

Wintertons ,
plaintiff's legal
practitioners

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