

BALLYCARNEY (1991) (PVT) LTD
versus
E T CHINDORI-CHININGA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 27 October, 2003 and 18 February 2004

Mr C Venturas for applicant
Mr J S Mandizha for respondent

HUNGWE J: On 27 October, 2003 I granted the final order in the case of *Ballycarney (1991) (Private) Ltd v Edward Chindori-Chininga* HC 9341/03 -

- " 1. That the Respondent and all those claiming occupation through him of Ballycarney Farm be and are hereby evicted by the Deputy Sheriff.
2. That police officers from Ceaser Mine are authorized to assist the Deputy Sheriff in executing this order and anyone who obstructs or interferes in any manner with them should be arrested and detained for Contempt of Court and they be authorized to restore full possession of the farm and its property to the Applicant.
3. That the Respondent be interdicted from in any way whatsoever interfering with the Applicant's business.
4. Respondent pay Applicants costs on an attorney-client scale.
5. Each party to pay its costs".

The respondent noted an appeal against that order.

In terms of the Rules of Court, the Respondent ought to have filed his notice of appeal with the Supreme Court on or before 17 November, 2003.

On 1 December, 2003 applicant acting in terms of the Order of this Court attempted to evict Respondent.

It failed. On 3 December, 2003 Respondent filed his notice of appeal.

This is an application for leave to execute on the order of 27 October, 2003

notwithstanding the notice of appeal filed of record.

In the exercise of its inherent power to grant leave to execute pending an appeal the Court takes into account, among other factors the following factors -

- "a) the possibility of irreparable loss or damage if the judgment is not put into effect. *Honche v Bessart N O & Ors* 1952(1) SA 687 at 688G-689A; *Walkers Fruit Farm Ltd & Another v Hopkins and Others* 1965(2) SA 360 at 364 H; *Fox & Carney (Pvt) Ltd v Carthew-Gabriel (2)* 1977(4) SA 970 (R);
- b) The lack of prospects of success on appeal; *Ruby's Cash Store (Pvt) Ltd v Estate Marks* 1961(2) SA 118(T) at 127H; *Durban City Council v Premlall & Another (2)* 1972(1) SA 547 at 550C-661A.
- c) The commission of a criminal offence or the condonation of an illegality; *Burlington Husery Mills (Pty) Ltd v Arwa (Pty) Ltd* 1977(4) SA 150 (W) at 153 D-H; *Durban City Council (supra)*.
- d) The requirements of real and substantial justice, special circumstances, the possibility of restoring *status quo ante*. (*Ruby's Cash Store (supra)*).
- e) The inherent jurisdiction of the Court to avoid injustice and hardship, the presence of exceptional circumstances and the prospect of leaving a litigant remediless. *Airoad Express (Pty) Ltd v Chairman, Local Road Transportation Board, Durban & Others* 1986(2) SA 663 at 676 A-E;
- f) The provision of good and sufficient security for the due performance of such judgment as may be given on appeal. *Greyling v Estate Pretorius* 1947(3) SA 514 at 517-8.

The facts in the present case reveal that the order granted by the Court had been consented to by the parties. The judgment makes this clear.

Secondly the applicant stand to suffer irreparable damage in respect of the crop that needs to be harvested and exported. On the papers there are allegations that amount to the theft by respondent or his agents. It is clear therefore that a refusal of the present application is likely to amount to a condonation of an illegality and the commission of crime. It offends any reasonable

member of society's sense of what is just were this Court to condone conduct which amounts to a criminal offence simply because it has been committed under the guise of a legislative action or the land reform programme.

On a broad consideration of all the factors that I am enjoined to take into account even if it may be that there is room that a higher Court may come to a decision different from the one I gave, and in the exercise of my judicial discretion, I am satisfied that this is an appropriate case to grant leave to execute pending the determination of an appeal.

There will be an order in terms of the draft.

Byron Venturas & Partners, legal practitioners for applicant
Mandizha & Company, legal practitioners for respondent