OLD MUTUAL LIFE ASSURANCE COMPANY (PRIVATE) LIMITED
versus
D. L.MAKGATHO

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 21 May and 6 June 2007

Opposed Application

Mr *E Jori* for applicant
Mr *B Dlakama* for respondent

MAKARAU JP: This is an application for leave to execute pending appeal.

On 13 September 2006, this court issued a judgment in favour of the applicant. In the judgment, the court ordered the respondent to pay the applicant the sum of $121.52 together with interest thereon at 30 % p.a reckoned from 9 October 2003 to date of payment and the sum of R201 750-08 together with interest thereon at the rate applicable in South African law, also reckoned from 9 October 2003 to date of payment in full. The court also made an award of costs against the respondent. Dissatisfied with the judgment, the respondent noted an appeal to the Supreme Court. The appeal is currently pending under SC 260/06.

Believing that the respondent had noted the appeal for the purposes buying time and frustrating the applicant in its efforts to recover the judgment debt, the applicant filed this application on 17 January 2007.

The facts emerging from the suit determined by this court in September 2006 are fairly simple and are largely common cause. I summarise them as follows:

The applicant recruits and selects actuarial students to whom it awards bursaries. In February 1995, the applicant awarded a bursary to Fortune Makgatho, the respondent's son who was reading for a degree in actuarial science at the University of Cape Town. Fortune and the applicant entered into a written agreement. One of the terms

of the agreement was that Fortune would maintain a certain standard of academic performance failing which the bursary would be withdrawn and the amount paid over would be deemed to be a student loan payable upon demand. The respondent signed a suretyship in favour of the applicant for the due performance of the obligations assumed by Fortune under the bursary agreement. In the suretyship, the respondent bound himself as a co-principal debtor.

Regrettably, Fortune did not meet the conditions set out in the agreement between himself and the applicant in one respect or the other and the amount expended over the years as fees and other support was deemed to be a loan and was demanded. Summons was then issued against the respondent as surety and co-principal debtor.

In defending himself at the trial of the matter, the respondent was of the view that Fortune had not breached the agreement between him and the applicant and that even if he did, the applicant had an obligation to inform him of Fortune's breach.

In his judgment, the trial judge found that the respondent had towards the end of the trial accepted both liability and the quantum of the debt. It was on this basis that judgment was accordingly entered against him.

In the notice of appeal, the respondent raised three grounds. Firstly, he averred that the trial court erred in failing to consider that the applicant had an obligation to inform him of the alleged unsatisfactory academic achievements of Fortune. Secondly, he averred that the trial court erred in failing to take into account that the inconsistencies in applicant's case as to how Fortune had breached the agreement. Lastly, the respondent averred that no evidence had been led as to how much the applicant had paid in fees for Fortune and how this payment had been made.

As stated above, the applicant then approached this court for leave to execute the judgment in its favour pending determination of the appeal.

The application for leave to execute pending appeal was opposed. In the notice of opposition, the respondent raised the point that while the applicant paid a total of R201 750-08 to Cape Town University, the trial court erred in ordering that the respondent pays back this amount as the applicant must have expended local currency to purchase the requisite foreign currency and judgment ought to have been given in the amount of local currency used to purchase the foreign currency.

At the hearing of the matter, the respondent was barred for having failed to file and deliver heads of argument in terms of the rules. I however decided to determine the matter on the merit rather than enter a technical default judgment in favour of the applicant.

In *casu*, I would agree with *Mr Jori* that on the basis of the issues that were before the trial judge as captured on the pre-trial conference minute, there is no prospect of success on the part of the respondent overturning the judgment. Both the trial judge and Mr *Jori* in his heads of argument before me have meticulously dealt with each issue that was identified and have in my view, fully answered each in a manner that robs the respondent of any prospects of success on appeal.

There is however one issue that has exercised my mind in this application. It is the contention raised by the respondent in his opposing affidavit that his liability to the applicant was not in foreign currency but in local currency.

It is common cause that this is not an issue that arose either from the pleadings or at the pre- trial conference of the matter. The respondent did not raise it at the trial of the matter, thus the trial judge did not at all advert to it in his judgment. It is further common cause that this issue was not canvassed at the trial of the matter as the evidence of both parties was directed towards the issues that had been identified for trial.

In determining an application for leave to execute pending appeal, the approach that a court must take appears to me to be

settled. This court has for long been guided by the remarks of CORBETT JA in *South Cape Corporation (Pty) Ltd v engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at page 545 in the following vein:

> "In exercising this discretion (to grant leave to execute pending appeal), the court should, in my view, determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute was were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
> (3) the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

(See *Arches (Pvt) Ltd v Guthrie Holdings Pvt) Ltd* 1989 (1) ZLR 152 (HC); *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (HC) and the cases cited therein).

The position as stated in the decided cases then appears to me to be as follows:

1. An appellant has an absolute right to appeal and to test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible.
3. Where however the appellant brings the appeal with no bona fide intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or to harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment

notwithstanding the absolute right to appeal vesting in the appellant.

4. In exercising its discretion, the court has regard to the considerations suggested by Corbett JA in *South Cape Corporation (Pty) Ltd v engineering Management Services (Pty) Ltd (*supra).
5. Where the judgment sounds in money and the successful party offers security *de restituendo* or the courts can safeguard the appellant by an order of security de *restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.
6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospects of success on appeal especially where the whole object of the appeal will be defeated if execution were to proceed. (See *Wood NO v Edwards & Another* 1966 RLR 335).

In determining the application before me I am aware that the appellant will have to introduce the issue raised in his opposing affidavit for the first time on appeal and that his prospects of succeeding in doing so appear limited as the issue goes to the discretion of the court and not to its jurisdiction. (See *Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S)). It further appears that if the point had been pleaded or raised in this court, further evidence as to the manner of payment of the proceeds of the bursary would have been necessary and would have been introduced. Because the issue was not raised, such evidence was suppressed and no determination was called for on the issue. As was aptly put by SANDURA JA *in Guardian Security services (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 2002 (1) ZLR 1 (S), at page 5D-E

> "...the purpose of pleadings is to clarify the issues between the parties, generally speaking, all the issues in a civil action should be raised on the pleadings. A party should not direct the attention of the other party to one issue and then, at the trial,

> canvass another unless the court grants him leave to amend his pleadings. However, in some cases courts have adjudicated on issues not raised on the pleadings even where no amendments have been applied for. This has been the case where the issues in question had been fully canvassed at the trial."

On the basis of the above, it further appears to me that the appellant may not be able to raise the point on appeal as the parties did not have a chance to canvass the issue in this court.

While it would appear that the respondent's chances of succeeding in introducing this new point on appeal for the first time are limited, that in my view does not mean that the application before must therefore succeed. As stated above, the prospects of success on appeal is not the sole and overriding consideration in an application such as the one before me.

It is my view that the appellant absolute right to appeal must be upheld at all times unless it is clear to the court that the appeal has been noted not with the genuine intention of testing the correctness of the judgment appealed against and that execution pending appeal will not have the effect of defeating the appellant's absolute right.

In *casu*, the applicant has simply relied on the dim prospects of success on appeal that the respondent appears to have. While I agree with *Mr Jori* that indeed the appellant's prospects appear rather limited, I am persuaded to uphold his absolute right to appeal in this matter as allowing execution will completely defeat that right even if I make an order for restitution.

In view of the fact that the respondent was barred and the application has failed on grounds that were not raised by the respondent in argument, I will not make an order for costs against the applicant.

In the result, I make the following order:

1. the application is dismissed

2. Each party shall bear its own costs.

Wintertons, applicant's legal practitioners.

Byron Venturas & Partners, respondent's legal practitioners.