SHAUN MANDAA KUDINGA
versus
RODGERS DHLIWAYO
and
THE CHAIRMAN, RENT BOARD

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 11 and 12 March 2008

Urgent Chamber Application

Mr F Katsande for applicant
Mrs E Bvumbi for 1st respondent.

MAKARAU JP: The applicant approached this court on a certificate of urgency, seeking leave to execute on the "ruling" of the second respondent dated 12 February 2008 in which he was granted a certificate for the ejectment of the first respondent from certain premises in Hatfield Harare.

BACKGROUND FACTS

I summarise the facts giving rise to the application as follows:

In August 2003, the applicant and the first respondent entered into a lease agreement in respect of the premises in Hatfield. The lease was to obtain for a period of 12 months with an option for renewal.

In February 2008, the applicant approached the second respondent for a certificate ejecting the first respondent from the premises. The application was granted and a certificate was duly issued in terms of s 30 of the Rent Regulations 2007. In terms of the certificate, the first respondent was to be evicted from the premises on 1 March 2008. The certificate was issued on 12 February 2008.

On 18 February, 2008, the first respondent noted an appeal against the decision of the second respondent, granting the certificate. The appeal was noted to the Administrative Court.

Believing that the certificate issued by the second respondent was now incapable of enforcement, having been suspended by the noting of the appeal and that the second respondent had no jurisdiction to order the execution of its "ruling" pending appeal, the

applicant approached this court, requesting it to exercise its inherent jurisdiction under s 13 of the High Court Act [*Chapter 7.06*].

In his certificate of urgency, the applicant's legal practitioner was of the view that the matter was urgent as the first respondent is operating Lodges at the leased premises without licence and the premises were being used for immoral purposes.

The application was opposed.

In his opposing affidavit, the first respondent denied all the allegations by the applicant, raised the issue of the *locus standi* of the applicant's agent to swear to the founding affidavit and further argued that the matter was pending before this court under case No HC 5887/07 which has been set down for hearing on 25 March 2008.

THE LEGAL ISSUES

At the commencement of the hearing, I requested the parties to address me specifically on whether the noting of the appeal against the decision to grant the certificate of ejectment suspended the certificate. Both counsel were of the view that it did and that I could entertain the application on the test laid down for the granting of leave to execute pending appeal.

I am unable to agree.

It appears to me to be the settled approach of this court that the common law principle to the effect that the noting of an appeal suspends the decision appealed against only applies to judgments of the superior courts. (See *PTC v Mahachi* (2) HH183/98; *Vengesai and Others v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) and *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (HC)). The views of this court are clearly expressed by GILLESPIE J (as he then was) in *Vengesai and Others* at page 599 C as follows:

> ".. the grant, whether automatic or not of stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal noted or any temporary stay. It follows that the question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from common law, applicable in superior courts of inherent jurisdiction."

The above debate, including the extensive discourse that Gillespie goes into on the subject arose from the uncertainty on the issue created by an earlier and binding decision by the Supreme Court in *Phiri and Others v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S). In that matter, KOSAH JA held that: "By Roman Dutch Law the execution of all judgments is

suspended upon the noting of an appeal", when dealing with an appeal from the Minister to the Labour Relations Tribunal in terms of the Labour Relations Act, 1985.[1]

The decisions of this court ever since the judgment have sought ways of avoiding following the *ratio decidendi* in the matter, with GILLESPIE J submitting to be bound by the decision but respectfully calling upon the Supreme Court to revisit its decision on the issue.

I add my voice to those of the eminent judges before me who query the correctness of the statement of law enunciated in the *Phi*ri case and who with the appropriate deference and the greatest of respect, call upon the Supreme Court to revisit its decision for the sake of clarity and certainty in the law.

Accepting to be bound by the *ratio decidendi* in the *Phiri* case, to the effect that the execution of all judgments is suspended upon the noting of an appeal, it is my view that the issuance of a certificate of ejectment by a Rent Board is not a judgment as envisaged by the rule of practice in the superior courts.

A certificate of ejectment is issued in terms of s 32 of the Rent Regulations, 2007. In granting the certificate, the Board is enjoined to specify in the certificate the date on or before which the tenant is to vacate the dwelling.[2] The statute does not proceed to specify that in the event that the tenant does not vacate the dwelling on the specified date, a writ for his ejectment may be issued by the Board or any other competent authority.

The purpose of the certificate appears to me to be explained in the provisions of s 30 of the regulations. Section 30 (2) (e) of the regulations provide that:

> "(2) No order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom, which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court so long as the lessee continues to pay the rent due within seven days of the due date and performs the other conditions of the lease, unless in addition-
>
> (e) the appropriate board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable on some other ground stated therein and the date specified in the certificate for the vacation of the dwelling has passed."

It thus appears to me that the issuance of a certificate by the rent board is merely a preliminary step before the obtaining of a court order for the ejectment of the tenant. It is not the ejectment order itself. It is not a judgment nor can it be used for the purposes of issuing a writ of ejectment from any court.

---

[1] The Labour Relations Act 1985 was repealed and replaced by the Labour Act [*Chapter 28.01*].
[2] See S 32 (5) of S.I. 32/07

In my view, the same point appears to have been made obliquely by GUBBAY CJ (as he then was) in *Fletcher v Three Edmunds* (Pvt) Ltd 1998 (1) ZLR 257 (S) where at 263 C he held that the respondents before him had no cause of action when they approached the lower court for an order evicting the appellants as they did not have the requisite certificate from the appropriate rent board at the time summons were issued. On the basis that they had not obtained the certificate prior to the issuance of the summons for eviction, he held that the default judgment of the lower court evicting the appellants in the absence of the certificate was void.

In *Jackson v Unity Insurance Company Co Ltd* 1999 (1) ZLR 381 (S) again GUBBAY CJ had occasion to rule on the purpose of a certificate issued in terms of s 30 of the Rent Regulations.[3] In that matter, the landlord had written to the tenant declaring that the lease was to terminate on some future date on account of an alleged breach of the lease by the tenant. The future date came and went by. The tenant remained in occupation. The appellant approached the High Court for an order evicting the tenant without first approaching the appropriate rent board for a certificate. The order was granted hence the appeal to the Supreme Court. In allowing the appeal, the then Chief Justice had this to say at 383 G-

> "It necessarily follows that having elected to give notice of termination of the contract of lease from some future date and not to exercise its right to resile therefrom immediately, the respondent was caught by s30 (2) of the Regulations. It was debarred from obtaining relief from the High court. For it had not obtained, in accordance with para (e) to s 30 (2), a certificate that the requirement that the appellant vacate the prmises on the ground that he had unlawfully operated a scooter hire business thereon is "fair and reasonable", and that the date specified for vacation had passed."

In my view, the purpose of a certificate of ejectment and its legal complexion were aptly put by MUBAKO J in *Chibanda v Musumhiri and Another* 1999 (2) ZLR 50 (H). Following the decision in *Fletcher v Three Edmunds P/L* (supra), the learned judgment took a swipe at the rent regulations for interfering with the judiciary role in matters relating to the fixing of rentals and the eviction of errant tenants from dwellings and for reducing such to a clerical role. At page 56 C-E:

> "….s 30 (4) (which) continues to fetter the court's hands relative to issuing an order of ejectment of a lessee. The court can take no such action even where justice would otherwise require it to act except along the path allowed by the regulations.
> Subsection (4) requires that the lessor must first apply to rent board and obtain a certificate which says it is fair and reasonable to require the lessee to vacate the dwelling. In respect of the case at hand, Mr Sinyoro submitted that the obtaining of the certificate must precede the court order for eviction. He was perfectly correct. That is the natural construction which must be put on s 30 (4),……."

[3] While the 1982 Regulations have been amended by the 2007 regulations, s 30 of the old regulations has been transported unaltered into the new regulations.

It thus presents itself clearly to me that the noting of an appeal against the decision of the rent board to issue a certificate in terms of s 30 of the regulations is not an instance where this court can use its inherent jurisdiction to order that the tenant be evicted from the dwelling pending the determination of the appeal. The landlord still has to obtain an eviction order on the back of the certificate from a court of competent jurisdiction.

It may be necessary at this stage to remark in passing that while the second respondent was chaired by a Magistrate, he sat in his capacity as such and not as a magistrates' court. Thus, whatever decision the second respondent made, such was made under the regulations and is not a decision of the magistrates' court.

It may also be worth mentioning, again in passing, that magistrates who preside over or chair rent board proceedings in terms of s 32 of the Rent Regulations 2007, may assist the situation by avoiding issuing "orders" and "judgments" as if they are presiding over court proceedings. The use of such terms, which are terms ordinarily associated with court proceedings may have the unfortunate effect of confusing lay persons and some legal practitioners into equating certificates of ejectment with orders of ejectment. The appropriate nomenclature to use for rent board proceedings and decisions is to be found in the regulations and should be used at all times. in terms of s 32, rent boards issue certificates of ejectment and not ejectment orders. They do not hand down judgments, orders or rulings. They can only either issue a certificate of ejectment or decline to issue such a certificate. Their decisions cannot be executed upon as they are merely preliminary steps before a landlord can obtain a court order evicting the tenant from the premises in dispute.

DISPOSITION

In view of the order that I make in the matter, it is in my view not necessary that I deal with the other issues of adjectival law raised by the first respondent in his opposing affidavit. These relate to the capacity of the deponent to the applicant's affidavit to file an affidavit in the absence of an affidavit by the applicant himself and to the allegation that the matter is pending before this court under case number HC 5887/07.

In the result, I make the following order:

1. the application is dismissed
2. The applicant shall bear the costs of the application.

F M Katsande & Partners, applicant's legal practitioners.

Mkuhlani Chiperesa, 1st respondent's legal practitioners.