PETER MUGWAMBI
versus
AJANTA PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 18 and 19 August 2008

URGENT CHAMBER APPLICATION

Mr A Mugandiwa for applicant
Mr I Ahmed for 1st respondent.

MAKARAU JP: The applicant leases certain commercial premises from the first respondent. He has been a tenant of the first respondent since 1998. Then, the relationship between the parties was regulated by an oral lease agreement. In 2005, the parties entered into a written lease in respect of the same premises.

On 25 January 2008, the first respondent caused summons to be issued out of the magistrates' court, seeking the ejectment of the applicant from the leased premises. The first applicant duly entered an appearance to defend the suit prompting the first respondent to apply for summary judgment which was duly granted. Aggrieved by the decision, the applicant noted an appeal to this court. In turn, the first respondent applied for leave to execute pending appeal which again was granted. Again the applicant noted an appeal against the granting of this interlocutory relief notwithstanding the noting of the appeal against the order granting execution pending appeal, the applicant was served with a warrant for his ejectment from the premises, prompting his to approach this court on a certificate of urgency, praying for an order staying execution pending the two appeals.

The application was opposed.

In argument, *Mr Mugandiwa* made two broad submissions. Firstly, he argued that the applicant had prospects of success on appeal as the lower court had no jurisdiction to entertain the matter and even if it had, the defence proffered by the applicant to the application for summary judgment raised a material dispute of fact that was incapable of resolution without referring the matter to trial.

Secondly, he stressed that the applicant had an improvement lien over the property and that until he was compensated for the improvements he has effected on the property, the first

respondent has no right to seek for his eviction form the premises. In this regard, he was emphatic that the oral agreement between the parties as at the commencement of the lease in 1998 was binding and overrides the express provisions of the written lease agreement that provides that no compensation shall be payable for any improvements that are effected without the lessor's written consent.

It is necessary in my view that I set out the applicant's version of events in full. It is as follows.

The applicant and the first respondent entered into an oral lease agreement in 1998. In terms of the agreement, the applicant was authorized to construct a building on the property which he could use as offices for a car hire business. He alleges that it was agreed between the parties that upon his vacating the premises, he would be paid compensation for putting up the building. Conversely, it was agreed that the lessor would only seek the eviction of the applicant from the premises upon paying compensation for the value of the improvement. In 2005, the parties entered into a written lease agreement which did not have retrospective effect. It did not affect the rights that the parties had accrued by virtue of the earlier verbal agreement. In November 2006, the first respondent tried to evict him from the premises and the issue of the improvements he had effected on the property was raised but could not be resolved. The first respondent then changed legal practitioners and caused summons to be issued against him as I have detailed above.

In addition to alleging certain other irregularities in the proceedings of the lower court, the applicant prays that on the basis of the foregoing, it is just and equitable that this court stays execution of the eviction order pending determination of the appeal that he has noted to this court.

The power to grant stay of execution pending appeal is a common law exercise of the power that inheres in this court. In this regard, the court enjoys the discretion of widest kind. The main guiding principle for the court in determining such applications is to grant stay where real and substantial justice requires such a stay or conversely, where injustice would otherwise be done. (*See Standard Bank of South Africa Ltd and Another v Malefane and Another: in re Malefane v Standard Bank of South Africa Ltd and Another* 2007 (4) SA 461 (Tk); *Road Accident Fund v Strydom* 2001 (1) SA 292 (C). *Williams v Carrick* 1938 TPD 147 at 162; *Strime v Strime* 1983 (4) SA 850 (C) and *Graham v Graham* 1950 (1) SA 655 (T)).

The court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to the applicant if stay is not granted, the potentiality of irreparable harm to the respondent if stay is granted and where there is the possibility of irreparable harm to both parties, the balance of hardship or inconvenience.

In *casu*, the factor that has weighed heavily with me are the poor prospects of success on the part of the applicant on appeal.

It is common cause that the applicant wishes to attack the lower court's decision on the basis that the lower court had no jurisdiction in the matter. In this regard, heavy weather has been made of the fact that at a time when the monetary jurisdiction of the magistrates' court was $5 million, the applicant was paying service charges in excess of $20 million per month to the service providers. In my view, this argument is legally untenable in view of the express provision of the lease agreement in clause 26 in terms of which the parties consent to the jurisdiction of the lower court. It is trite that parties may confer jurisdiction on a court that would not otherwise have jurisdiction if they confer jurisdiction on that court in writing.

The applicant also seeks to rely on the alleged improvement lien that he has over the property to defeat the first respondent's claim for eviction. In this regard he has relied on the verbal lease agreement of 1998 in which he alleges that the parties agreed that the first respondent would compensate the applicant first before seeking his eviction from the premises. In my view, this agreement is again not tenable in view of the provisions of the lease agreement that the parties concluded in 2005 and by whose virtue the applicant now enjoys the status of statutory tenant. By entering into the written agreement in 2005, the applicant did himself a disservice as he did not safeguard the rights he may have acquired under the oral agreement of 1998. This is so because in the written agreement, the parties specifically agreed that all oral agreements between them would not be binding. In one swoop of the pen, the applicant signed away any rights he may have had under the oral agreement and agreed that only those agreements reduced to writing would bind him and the first respondent. It is on this basis that he cannot now seek to rely on the earlier oral agreement to set up a claim regarding the improvements he effected on the property.

On the basis of the above, I would use the discretion vested in this court to deny a stay of execution in this matter. I am not persuaded that it is in the interests of real and substantial justice that stay be granted.

I also regard it as unnecessary that I consider the balance of convenience in this matter in any great detail. In my view, no injustice would be done to the applicant if execution is not stayed as his claim for improvements will not die if he vacates the premises. It is also my view that there is no possibility of irreparable harm to either of the parties but that it is in the interests of justice that the first respondent be allowed to execute pending appeal in line with the order that he obtained from the lower court to that effect.

There is one other issue that has exercised my mind in this application. It is the practice that has mushroomed in the lower court and which practice was followed in this matter, where an order for leave to execute pending appeal was also appealed against, in an effort to suspend its operation. In argument, the point was raised by *Mr Ahmed*, and correctly so in my view, that an order for leave to execute pending appeal is an interlocutory order. It is not final as it is pending the appeal. As such, in my view, it cannot be appealed against.

Section 40 (2) of the Magistrates Act [Chapter 7.10] provides that appeals from the magistrates court to this court shall lie against any rule or order if such has the effect of a final and definitive judgment.

It is now the settled position in this court that an order for leave to execute pending appeal is an interlocutory order and is not decisive or definitive of the rights of the parties.

On the basis of the foregoing, it is the correct position in my view that the noting of the appeal against the order of the lower court granting leave to execute pending appeal is of no force and effect.

In the result, I make the following order:

1. The application is dismissed
2. The applicant shall bear the respondent's costs.

Wintertons' applicant's legal practitioners.

Ahmed & Ziyambi, first respondent's legal practitioners.