RITENOTE PRINTERS (PRIVATE) LIMITED
versus
ADAM AND COMPANY
and
MESSENGER OF COURT

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versus
A. ADAM AND COMPANY
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 11 and 24 November 2010

**Urgent Chamber Application**

*T. Mpofu,* for the applicants
*S. Mupindu,* for the first respondent

GOWORA J: These matters were referred to me in chambers and as the parties were the same and the issues from the matters identical I decided to hear them together.

The founding affidavit for both matters has been deposed to by one John Kanokanga who is a director of the applicant. The contents of both affidavits are identical, except as they relate to the addresses of the premises that are in issue in each of the matters, and I will therefore set out the basic facts outlined in the affidavit. The applicant was leasing two premises from the respondent, namely 109 Leopold Takawira Street and 147 Mbuya Nehanda Street and Nelson Mandela Avenue respectively. In December 2009 the respondent issued summons out of this court for the eviction of the applicant from the premises at 147 Mbuya Nehanda Street and in April 2010 it followed suit for the eviction of the applicant from 109 Leopold Takawira Street. When both matters reached pre-trial conference stage the respondent filed notices of withdrawal in respect of both and instituted applications in the Magistrates Court at Harare in September 2010.

The applicant opposed the applications but was unsuccessful and ultimately the court ordered that the applicant be evicted from both premises. On 24 September 2010 the applicant appealed against the judgment of the magistrate in both matters. It also on the same date filed applications, ex-parte for an order staying execution of the judgment in both matters. The

applications were dismissed by the magistrate. In the meantime pending judgment on those applications, the applicant filed these applications under certificates of urgency for orders staying execution of the judgments. The respondents have opposed the granting of the applications.

The nature of the relief sought in both matters is also identical. What the applicant seeks in the Provisional Orders, except for the description in para 4 of the premises to which the applicant seeks restoration in either of the applications, is in the following terms:

TERMS OF FINAL ORDER SOUGHT

THAT you show cause to this Honourable Court why a final order should not be made in the following terms:-

1

Attachment, ejectment and execution against property carried out by 1st respondent at No 109 Leoplod Takawira Street Harare be and is hereby declared unlawful.

2

second respondent shall return to applicant all attached property pending finalization of appeal

3

first respondent is barred from further attaching in execution applicant's property pending finalization of appeal

4

Respondents be and are herby ordered to restore occupation of No 109 Leopold Takawira Street.

INTERIM RELIEF GRANTED

Pending the determination of this matter the applicant is granted the following interim relief;-

1

Respondents be and are hereby barred from selling in execution applicant's property which they attached which is captured in the notice of attachment.

2

Respondents be and are hereby ordered to restore occupation at the concerned premises to applicant forthwith

3

That this Provisional Order be served by the applicant's legal practitioners on the respondents.

Mr *Mpofu,* on behalf of the applicant, submitted that the noting of the appeal to this court against the judgment of the magistrates court, hence the need for a judgment creditor to obtain leave to execute pending appeal. The common law position is that superior courts have an inherent jurisdiction to regulate their own procedures and process. A rule of practice therefore evolved whereby the operation of the judgment of a superior court is suspended upon the noting of an appeal against that judgment.

I will start my discourse on this issue with an examination of the provisions of the Magistrates Court Act [Cap …. ]. Section 40 (3) of the Magistrates Court Act [*Cap 7:*…] provides for the court to direct either that the judgment be executed pending appeal or for a stay of the judgment pending the determination of an appeal. This provision in my respectful view acknowledges the absence of an inherent discretion within the court for the automatic suspension of the operation of a judgment or order upon the noting of an appeal. The subsection therefore is specifically intended to provide the court with the power to suspend the operation of a judgment upon the noting of an appeal.

It appears however that there is some dissent in our jurisdiction as to the application of this rule to appeals against judgments that do not emanate from courts of superior or inherent jurisdiction. The notion that this rule is of general application was disabused by GILLESPIE J in *Vengesai & Ors v Zimbabwe Glass Industries* Ltd 1998 (2) ZLR 593. It was reaffirmed by MUNGWIRA J in *Founders Building Society v Mazuka* 2000 (1) ZLR 528 wherein she stated:

> "I find that I cannot express my view on the matter better than by making reference to the following remarks of GILLESPIE J in the case of *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598T:
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> 'In stating the common law, CORBETT J referred to the automatic stay of execution upon the noting of an appeal, as a rule of practice. That is, not a firm rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Moreover, the authorities cited by CORBETT C J are authorities relevant to appeals from superior courts".

The reference to this rule as a rule of practice shows the acceptance by the learned Judge of the analysis by JANSEN J. This analysis leads inexorably 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 discretion is imposed. It follows that, in the absence of any statute specifically conferring such discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by the statute. It cannot order suspension of its own judgments notwithstanding an appeal. The only basis upon which its judgments or order can be supposed to be stayed is where its enabling statute provides for the situation. Therefore the grant, whether automatic or not, of a 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 or any temporary stay. It follows that the question of enforcement pending appeal of judgment from an inferior court cannot possibly be regulated according to a rule of practice derived from common law, and applicable in superior courts of inherent jurisdiction. In *Chatizembwa v Circle Cement* HH-121/94 (not reported) SMITH J in considering the same issue in the context of an appeal to the Labour Tribunal by an applicant dismissed in terms of a registered Code of Conduct stated at p4 of the judgment:

> "If the legislature had intended that the decision of the body concerned under the code of conduct should be suspended pending an appeal, it would have said so as is done in s 113(3). In addition it would have inserted a power enabling the Labour Relations Tribunal to declare otherwise in appropriate circumstances. The fact that it did not make a specific provision to that effect is a clear indication that it did not intend the noting of an appeal to suspend the decision appealed against. The introduction of the concept of registered codes of conduct which are binding on employers and employees is, to my mind, consistent with principle that determinations made in accordance with the provisions of a registered code should have effect until such time as any appeal is determined."

This dicta, appears in my view, to run counter to what was expressed by KORSAH JA in *Phiri & Ors v Industrial Steel Pipe (Pvt) Ltd* 1996 (1) ZLR 45 at 49D wherein he stated:

> "I am of the persuasion that, in the absence of a clear indication by the law giver to the contrary, the common law position that the execution of all judgments is suspended upon the noting of an appeal, is not ousted by the silence of the statutory instrument, in terms of which the respondent's appeal to the Tribunal was lodged upon the effect of such appeal against the order made by the Minister."

Earlier on in the judgment this is what the learned judge of appeal stated:

> "By Roman Dutch Law the execution of all judgments is suspended upon the noting of an appeal. *Reid & Anor v Godart & Anor* 1938 AD 511 at 513, per DE VILLIERS JA, cited with approval by ADAM J in *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 154G. DE VILLIERS JA explained that-

> 'The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under a writ, or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from."

The damage that was meant to have been prevented *in casu* has happened not because the applicant did not seek to protect its interest, but because due to uncertainty in the law, the judgment creditor proceeded to execute against the judgment despite the noting of the appeal. The order from the magistrate dismissing the application came after the process has started.

In *PTC v Mahachi* 1997 (2) ZLR 71(H) CHATIKOBO J chose to follow Phiri's case. In *Kudinga v Dhliwayo & Anor* HH 22/08 MAKARAU JP (as she was then) added her voice to those of eminent judges who before her had expressed the fervent calls for clarity in the law relating to the suspension of judgments from statutory tribunals or courts of inferior jurisdiction and for the Supreme Court to revisit its decision in Phiri's case. I respectfully agree.

I have been urged by counsel for the applicant to exercise my discretion and right a wrong that has been alleged to have been committed against the applicant. This submission is premised on the view that the noting of the appeal automatically suspended the operation of the order appealed against. In my view the respondent, given the uncertainty in the law, may have felt justified in its entitled to execute against the judgment in the absence of an order from court suspending execution of the same. The law however is on the side of the applicant in that based on Phiri's case, the noting of the appeal by the applicant automatically suspended execution of the judgments in both matters.

Mr *Mpofu* has urged me to right the wrong that has been done to the applicant as regards the execution of the judgments pending appeal. He has, relying on *S v Taenda*, 2000 (2) ZLR 394; *S v Chakwinya* 1997 (1) ZLR 109; and *S v Ndiweni* 1983 (2) ZLR 49 urged this court to exercise its discretion to remedy the wrong to the applicant. It seems to me that the authorities cited by counsel are of no assistance as the court in those cases, exercised the review powers of the High Court in criminal matters. The court then invoked the provisions of s 18 (2) of the Constitution which requires that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. Counsel did not elaborate as to how I should exercise my jurisdiction in favour of the applicant. It seems to me that the applicant had the right either to appeal against the ruling of the magistrate or seek a

review. It chose to do neither and instead approached this court for an order to stay execution in complete disregard of the earlier proceedings before the magistrate.

Mr *Mupindu* submitted that the applicant was improperly before the court in that an application for a stay of execution had been made by the applicant to the Magistrates Court and had been dismissed. He wondered whether the applicant was seeking a review or an appeal against the decision of the Magistrates Court. The magistrate had apparently dismissed the application on the premise that the noting of the appeal had suspended the operation of that judgment. Mr *Mpofu*, incorrectly in my view, submitted that the applicant was not dissatisfied with that judgment as it was a correct statement of the law. Accepting as the applicant did that it was a correct statement of the law, the applicant would appear to have decided to approach this court for the exact same relief denied it by the magistrate. What it has done however is to mount the same application to this court and ignore totally the order of the court *a quo* dismissing the application for a stay of execution. The order of the court a quo dismissing the application for a stay is still extant and in my view this court cannot be seen to be giving an order differing from that order whilst it is still extant. This would result in two orders from two different courts which would be in conflict of each other. Which order would then be binding upon the parties. To do so would constitute a clear departure from rules of procedure and an open invitation to litigants to treat the orders of court with contempt, because that is what my order would constitute.

In the premises the applicant is non suited and the applications are dismissed with costs

*Hamunakwadi Nyandoro & Nyambuya,* applicants' legal practitioners
*Mupindu Legal Practitioners,* first respondent's legal practitioners