U-TOW TRAILERS (PVT) LTD
versus
CITY OF HARARE
and
SUPERLUX TRAILERS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 25 March 2010 & 19 January 2011

Opposed Matter

L Mazonde, for the applicant
T Magwaliba, for the 2nd respondent

CHATUKUTA J: This is an application for leave to execute the judgment granted in case No. HH 103/09 pending an appeal noted by the 2nd respondent against the judgment.

The background to the application is that in December 1994 the applicant and the 1st respondent entered into a lease agreement in respect of certain premises situate at number 9 Market Street, Eastlea, Harare (the premises). The lease agreement was renewable from time to time and was due to expire on 30 March 2010 by effluxion of time.

In April 2008, the applicant and the 2nd respondent entered into a joint venture to build trailers and panel beat motor vehicles. The 2nd respondent moved onto the premises pursuant to this arrangement. The joint venture however failed. Despite the failure of the joint venture, the 2nd respondent remained on the premises.

In January 2009, the 1st respondent summarily terminated the lease agreement on the basis that the applicant had sub-leased the premises to the 2nd respondent in breach of lease agreement. It proceeded to lease the premises to the 2nd respondent. The applicant successfully instituted proceedings in case No. HH 103/09 for an order nullifying the

termination of the lease agreement and the ejectment of the 2nd respondent's from the premises. The court ruled that the 2nd respondent had not established a defence to the applicant's claim for ejectment. On 29 October 2009, the 2nd respondent appealed against the decision hence the present application for leave to execute pending the appeal.

In determining an application for leave to execute pending appeal, the court must consider:

(a) the prejudice to be suffered by either of the parties in the event of the success or failure of the application;
(b) the prospects of success of the 2nd respondent on appeal; and
(c) the balance of convenience. (see *South Cape Corporation v Engineering Management Services Pty Ltd* 1977 (3) SA 534 (A) and *Net One Cellular (Pvt) Ltd v Net One Employee & Anor* 2005 (1) ZLR 275 281 B-D)

The applicant contended that it is likely to suffer irreparable harm if leave is not granted in that it had been operating from the premises since 1994 and would lose its customers and that its business would be adversely affected by the continued stay of the 2nd respondent on the premises. It still has its property on the premises and had been denied access to the same by the 2nd respondent. The 2nd respondent had not offered a valid defence to the claim of ejectment nor had it filed a counter-application asserting its rights under a purported lease agreement between the two. It further contended that the appeal by the 2nd respondent is frivolous and vexatious having been noted without a *bona fide* intent to seek and reverse the judgment but with the intention to gain time and harass the applicant.

On the other hand, the 2nd respondent contended that it was likely to suffer irreparable harm if the order for leave to execute pending appeal was granted in that it had been in occupation since 2008. It had also established a successful business on the premises. Its business would be equally prejudiced if it is ejected from the premises. The applicant was unlikely to suffer any harm as it had no been in occupation of the premises during that period. It further contended that the main ground of appeal against the judgment in HH 103/09 was that it had proffered a defence to the applicant's claim for ejectment which defence was improperly discounted by the court. It claimed that upon

the failure of the joint venture the parties entered into a lease agreement. The lease agreement had not been properly terminated and therefore it was entitled to remain in occupation pursuant to that lease agreement. It contended that if it were ejected it would not be able to be restored to the status *qou ante* and therefore the balance of convenience weighed in its favour. Its appeal did not lack *bona fides* in that the court should not have discounted its defence.

It appears to me that it is not in issue that the applicant is likely to suffer prejudice if leave to execute is not granted. The applicant has been operating from the premises from 1994 and has established a name for itself. The 2nd respondent is also likely to suffer prejudice if leave to execute is granted. It had also started establishing a name for itself, though over a shorter period having been in occupation since 2008. It however, appears to me that the applicant will suffer greater harm given that it has been in occupation for a longer period than the 2nd respondent.

Considering that both parties are likely to suffer harm, it appears that the determining factor is whether or not the 2nd respondent has any prospects of success on appeal. The 2nd respondent does not appear to have any prospects of success. The 2nd respondent was relying on the lease agreement with the 1st respondent as a basis for its present occupation of the premises. Following the setting aside of the termination of the agreement between the applicant and the 1st respondent by the court, the 2nd respondent can no longer rely on the lease agreement for its continued occupation of the premises.

It appears it cannot also rely on the purported sublease with the applicant. The sublease is clearly in breach of the agreement between the applicant and the 1st respondent. The lease agreement does not allow the applicant to sublease the property without the 1st respondent's authority. Such authority does not appear to have been sought or granted. The 2nd respondent did not dispute in its pleadings in case No. HH 103/09 that the sublease was invalid. In fact it argued that its lease agreement with the 1st respondent was valid because the 2nd respondent had subleased the premises to it in breach of the lease agreement with the 1st respondent. The applicant's contention that it is entitled to remain in occupation on the basis of an invalid lease is therefore not sustainable. The court, in case No. HH 103/09, ruled that the 2nd respondent did not have a legal entitlement to remain on the premises and it appears on the basis that the lease

agreement with the applicant was invalid. It is therefore not correct for the 2nd respondent to contend that the court did not consider its defence to the applicant's claim for ejectment. The court considered the defence and discounted it before proceeding to determine whether or not the termination of the agreement between the applicant and the 1st respondent was valid.

In view of the observations that I have made above, it seems to me that the balance of convenience weighs in favour of the applicant. The applicant has been in occupation for a period of seventeen years. It will certainly lose the goodwill attached to its operations on the premises if the 2nd respondent continues to remain in occupation. The second respondent will in fact be building its own goodwill if it remains in occupation to the detriment of the applicant. The 2nd respondent does not have any prospects of success on appeal because it does not have any legal entitlement to remain in occupation of the premises. It appears that the appeal was therefore noted merely to delay the inevitable. Any further delays in the execution of the judgment would in my view prejudice the applicant. It is therefore equitable in the circumstances that the applicant must succeed.

In the result, it is ordered that:

1. The applicant be and is hereby granted leave to execute the judgment of this court granted on 21 October 2009 in case HH 103/09 pending the appeal noted by the 2nd respondent against the judgment.
2. The 2nd respondent be and is hereby ordered to pay the costs of this application.

Muzangaza, Mandaza & Tomana, applicant's legal practitioners
Messrs Magwaliba & Kwirira, 2nd respondent's legal practitioners