

VARAIDZO MATEKO
versus
ZENUS BANDA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 28 June 2011 and 8 February 2012

Opposed Application

S Machiridza, for the applicant
S Kachere, for the respondent

MAVANGIRA J: This is an application for leave to execute a judgement of the High Court granted on 26 November 2010 HC 5332/06 pending an appeal noted in the Supreme Court by the respondent on 14 December 2010.

The facts presented by the applicant are as follows:

The respondent was a tenant of the late Eunice Taylor who was the owner of the property Lot 5 of Lot 18 and 19 Parktown Extension. The late Eunice Taylor had through public auction sold the property to the applicant. She had not accepted an offer made by the respondent to acquire the property. The applicant then gave the respondent notice to vacate the premises but the respondent did not vacate and from March 2007 the respondent was in occupation of the premises without paying rent. Consequently the applicant issued summons in the High Court for the eviction of the respondent. The applicant subsequently withdrew the summons after becoming aware that the respondent had filed a suit against Eunice Taylor in which he was seeking the setting aside of a sale to any other party and that the property be sold to him. The applicant was joined as a party to those proceedings and she filed a counter-claim for the eviction of the respondent and for holding over damages. During the trial of that suit the respondent withdrew the issue that he had the right of first refusal thus leaving only one issue for the determination of the trial court, namely, that relating to offer and acceptance.

The respondent's claim against Eunice Taylor was dismissed at the close of his case. The court made an order to the effect that the respondent and all those claiming through him

were to vacate the property in issue herein, being Lot 5 of Lots 18 and 19 Parktown Extension of Upper Waterfalls by 31 December 2010. By consent of the parties the respondent was to pay the applicant the sum of US\$ 380-00 per month as holding over damages for the period calculated from 1 February 2009 to date of vacation. The respondent was to pay the accrued holding over damages for the period from 1 February 2009 to 30 November 2010 failing which the applicant herein could execute the consent order to recover the said amount. The respondent was also to pay all outstanding utility bills for the property in issue on or before 31 December 2010. The respondent was also to pay costs of suit.

On 14 December 2010, the respondent noted an appeal against the said judgement. Three grounds of appeal are given herein. The first is that the court *a quo* erred in denying the appellant the chance to reopen his case to adduce evidence to prove that he believed that his offer had been accepted by the late Eunice Taylor through her agent. Secondly, that the court *a quo* erred in finding that the (appellant) respondent herein was no longer protected at law as a statutory tenant when it was the applicant herein who was refusing to accept rentals from him. Thirdly, that the court *a quo* in failing to consider the extent of improvements done by the respondent herein on the property in dispute and failing to set off the same from the amount claimed as arrear rentals and holding over damages thereby resulting in an unjust enrichment on the part of the applicant to the prejudice of the respondent.

The applicant bases the justification for this instant application on three main grounds. The first is that in the circumstances of this case irreparable harm and prejudice will be suffered by the applicant if execution is suspended pending the determination of the appeal. In the second place, that the respondent's prospects of success on the appeal are extremely slim. Thirdly, that the respondent is merely on a deliberate mission to frustrate the applicant and delay the day of reckoning.

In opposing the application in *casu* the respondent disputes the factual background given by the applicant. His version is that the late Eunice Taylor, through her agents, clandestinely sold the property in question to the applicant notwithstanding the fact that his offer to purchase the same had also been accepted. He contends that the two later connived to frustrate him. The respondent also states that he was seriously aggrieved by some parts of the judgement of this court that was granted and he thus filed an appeal challenging those parts of the judgement that aggrieve him; a procedure, he says, that he is perfectly entitled to take or follow. He denies that his appeal was noted merely to frustrate the applicant and to buy time.

As far as he is concerned, his appeal is meritorious and the balance of convenience favours that execution be suspended pending final determination of his appeal.

In *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (5) at 280 D – 281 D CHIDYAUSIKU CJ stated:

“...The employees after registering the arbitrator’s award with the High Court, should have applied for leave to execute after the noting of an appeal. In this regard CORBETT JA in *South Cape Corporation supra* at pp 544H -545H had this to say:

‘Whatever the true position may have been ..., it is today the accepted common law rule of practice in our courts that generally the execution of a judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application ... The purpose is to prevent irreparable damage being done to the intending appellant ... The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. ... This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. ... In exercising this discretion, 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 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 were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to 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, e.g. to gain time to 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.”

At 281G the learned CHIEF JUSTICE proceeded to state:

“Authorities clearly establish that at common law a decision of a lower court in respect of which an appeal has been noted cannot be executed upon. It can only be executed upon after leave to execute has been granted.”

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149H at 156 B – E SMITH J stated:

“In this country, as in South Africa, the noting of an appeal in a civil case automatically suspends the execution of any judgement or order granted by the court of first instance. In *South Cape Corp v Engineering Management Services* 1977(3) SA 534(A) CORBERTT JA (as he then was) said at 544:

‘it is today the accepted common law rule of practice in our courts that generally the execution of a judgement is automatically suspended upon the noting of an appeal... The purpose of the rule is to prevent irreparable damage from being done to the intending appellant.’

An application may however be made to the trial court for leave to execute pending the appeal and in any such application *supra* the onus is on the applicant to show special circumstances (see *South Cape Corp supra* at 545 and 548).”

In *Wood N D v Edwards & Anor* 1966 RLR 336 (G); 196(3) SA 443 (R) LEWIS J (as he then was) made it clear that the general rule as stated above, also applies in Zimbabwe and he referred with approval to *Reid v Godart* 1938 AD 511 when it was also stated that “the foundation of the common law rule is to prevent irreparable damage to the intending appellant.”

In the same judgement SMITH J also stated at 154 F – G

“In determining an application for leave to execute pending an appeal, the court must have regard to the “preponderance of equities”, the prospects of success on the part of the appellant and whether the appeal has been noted without “the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose e g to gain time or to harass the other party”: See “*Fox & Carney (Pvt) Ltd v Carthew-Gabriel* (2), 1977(4) SA 970 (R) and *ZDECO (Pvt) Ltd v Commercial Careers College* (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H).”

The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted

In this regard on this aspect the applicant’s legal practitioner submitted that the respondent has not in his opposition raised any irreparable harm or prejudice that he would suffer if leave to execute pending appeal were to be granted. A perusal of the respondent’s opposing affidavit tends to a large extent to confirm this submission. The respondents addresses this aspect in para 6 of his opposing affidavit. All that the respondent merely says

is that he will suffer irreparable harm if leave to execute is granted as that would effectively reduce his appeal as merely academic and not worth pursuing.

The potentiality of irreparable harm or prejudice being sustained by the respondent appeal (applicant in the application) if leave to execute were to be refused

It is the respondent's contention that as the applicant is already armed with a judgment in her favour, she will not suffer any irreparable harm if leave to execute pending appeal is refused. The respondent's contention is that it is him who will suffer irreparable harm in such circumstances in the sense that he would be ejected from the premises and yet may then eventually succeed in his appeal after such ejection. This then, in my view necessitates the examination and assessment of the third factor expounded in the *Net One Cellular* case *supra*.

The prospects of success on appeal, including whether the appeal is frivolous, vexatious or has been noted met with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to harass the other party

From a perusal of the judgment of the court HH 261-10 (HC 5332/06) (UCHENA J) against which the respondent's appeal lies, it is clear that no evidence was placed before the court to show that the appellant's offer was accepted. Rather, what clearly emerged on the evidence before that court was that the respondent's offer was never accepted. At p 6 of the judgment the following appears:

“The evidence led for the plaintiff (respondent in *casu*) proves he made an offer. He was then asked to wait while his offer was being considered. He was to check after seven days. When he inquired with the seller's agent he was told not to panic as his offer was still being considered. It is in my view not possible to say a reasonable man would make a mistake and find for the plaintiff that a contract of sale had been concluded between the plaintiff and the first defendant when it is clear that the seller had not accepted the plaintiff's offer. The plaintiff's evidence establishes that his offer was being considered. The offer form exh 2 confirms that the offer was not accepted. It was only signed by the buyer, while the seller's part remained uncompleted.”

In my view the above quoted excerpt from UCHENA J's judgement exposes the fallacy or futility of the respondent's first grounds of appeal. I agree with the applicant's legal practitioner's submission that it is immaterial what the respondent believed. The issue before the court then was whether there had been an offer and acceptance and that the court's

finding that there was no acceptance of the respondent's offer is supported by the evidence on record.

Regarding the respondent's second ground of appeal UCHENA J's judgment clearly addressed this aspect. At p 8 of the judgement (p 15 of the record) the following was stated:

"I agree that failure to pay rental because of the landlord's refusal to accept rent cannot be used to found a ground to evict the tenant from the premises. However in the case the refusal was for the month of February 2007 and was intended to ensure that the plaintiff vacated the premises to enable the fourth defendant's (applicant herein) family to occupy the house. If that was the only default I would have found that absolution from the instance should be granted as the parties have reached a settlement on the issue of damages."

The learned judge continued at 9:

"The plaintiff then led evidence to the effect that he offered rentals for the following months to date. He admitted that in his plea he disputed Matekos's title to the property and said he could not pay rentals to her. In his evidence he again said he did not recognise Mateko's title to the property, and could therefore not pay rentals to her. It is common cause that in terms of the expired lease rentals should therefore in spite of the refusal of rentals for February 2007, have tendered rentals for March 2007.

In view of the clear findings made by the learned judge as quoted above, the respondent's second ground of appeal also appears to me to be without merit. Having decided not to pay rentals to the applicant herein, the respondent cannot fault the learned judge's finding that he could not benefit from or enjoy the otherwise automatic protection that would have been afforded to him by virtue of the provisions of the Rent Regulations.

With regard to the respondent's third ground of appeal I have no hesitation in agreeing with the applicant's legal practitioner's submission that as the issue of the improvements allegedly done by the respondent was not specifically pleaded and was therefore not an issue before the court, the court cannot be faulted for not considering the same nor for not setting off the value of the same against the holding over damages and arrear rentals.

For the reasons discussed above, it is my view that the respondent has no prospects of success on appeal. It also appears to me that the appeal is frivolous and vexatious considering the fact that the respondent's consent permeates material portions of the judgment. An irresistible inference arising in the circumstances is that the appeal was noted not with the *bona fide* intention of seeking to reverse the judgment but probably to gain time to harass the

applicant. I therefore come to the conclusion that the applicant has successfully justified his application which will thus be granted as follows:

It is hereby ordered:

1. That the applicant be and is hereby granted leave to execute the judgment of this court dated 1 December 2010 in HC 5332/06 pending the appeal noted by the respondent.
2. The respondent shall pay the costs of this application.

Muzangaza, Mandaza & Tomana, applicant's legal practitioners
Musarira Law Chambers, respondent's legal practitioners.