

ZIMBABWE UNITED PASSENGER COMPANY
versus
GIFT INVESTMENTS (PRIVATE) LIMITED
and
JAYESH SHAH

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 November and 03 January 2018

Opposed Application

T Magwaliba, for applicant
L Uriri, for 1st respondent
No appearance for 2nd respondent

TAGU J: This is an application for leave to execute the judgment of this Honourable Court in case number HC 5501/06 delivered under HH 238/17 dated the 12th of April 2017 pending the determination of two appeals filed by the respondents separately in case number SC 289/17 on 5 May and 9 May 2017 respectively. The operative part of the judgment in HH238/17 read as follows-

- “1. The defendants or any person occupying the premises through them are ordered to vacate the premises known as No. 9 Hood Road, Southerton Harare.
2. The defendants shall pay the costs of this suit jointly and severally the one paying and the other being absolved on a legal practitioner and client scale.”

The applicant Zimbabwe United Passenger Company (ZUPCO) in HC 5501/06 had issued summons in 2006 for the eviction of the defendants or any persons occupying the premises through them to vacate the premises known as No. 9 Hood Rd, Southerton Harare which had been leased out to the respondents by the applicant following the expiry and alleged illegal renewal of the lease agreement. The court found in favour of the applicant and granted the relief cited above. The respondents appealed against the ruling. The applicant brought this application for leave to execute the above judgment pending appeal.

Both respondents filed notices of opposition. However, in filing its notice of opposition the first respondent mixed up the names causing the first respondent to appear as the second respondent and the second respondent as the first respondent. At the hearing of this matter it then appeared as if the first respondent had not filed its heads of argument causing counsel for the applicant to raise a point *in limine* that the first respondent was barred. A closer scrutiny of the papers showed that it was indeed the second respondent Jayesh Shah who did not file heads of argument and was therefore automatically barred in terms of the rules of this court. Jayesh Shah was called three times and was in default on the day of the hearing. It followed that judgment was entered against him.

As regards the first respondent it must be noted that the second respondent Jayesh Shah was the Managing Director of the first respondent Gift Investments (Private) limited a company duly incorporated in terms of the laws of Zimbabwe.

The requirements for an application of this nature were enunciated in *South Cape Corporation [Pty] Ltd v Engineering Management Services [Pty] Ltd* 1977 (3) SA 534 (A) @ 545D-F per CORBERT JA (as he then was) and cited with approval by NDOU J in *Masukume v Mbona & Anor* 2003 (1) ZLR 412 (H) as follows:

“In the exercise of this discretion the court should, in my view, determine what is just and equitable in all 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 Applicant on appeal (the Respondent in the application) if leave to appeal were to be granted;
- (2) The potentiality of irreparable harm or prejudice being sustained by the Respondent on appeal (the 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 with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party; and
- (4) Where there is the potentiality of irreparable harm or prejudice to both Applicant and Respondent, the balance of hardship or convenience as the case may be.”

THE POTENTIALITY OF IRREPARABLE HARM SUFFERED BY APPELLANT IF LEAVE IS GRANTED

In *casu* the applicant is the legal owner of the property in question. The first respondent (appellant) is occupying it illegally following some bribery paid by Jayesh Shah to some unscrupulous members of the applicant to facilitate an illegal extension of the lease agreement after the lease agreement expired. The first respondent can look for alternative

property elsewhere. The respondents do not allege that there is any irreparable harm which will befall them if the application is granted. Their affidavits concern themselves with the question of the prospects of success only. The applicant whose fleet has increased is being prejudiced in that the applicant is now forced to pay rentals to other property owners in Chitungwiza to house the excess part of its fleet. The applicant being the owner of the property is entitled to possessing it from any person who occupies it without its authority. *In Jolly v Shanon & Anor* 1998 (1) ZLR 78 (H) MALABA J (as he then was) at p 88 stated the following in regard to the position of an owner vis –a-vis his or her property:

“The principle on which the action rei vindication is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the Defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the Defendant to prove a right of retention: *Chetty v Naidoo* 1974 (3) SA 13 (A) @ 20A-C, *Makumborenga v Marine* S130/95 p2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings.”

In my view if the leave to execute is not granted there will be irreparable harm on the applicant.

THE POTENTIALITY OF IRREPARABLE HARM BEING SUSTAINED BY THE APPLICANT

The harm which is being suffered by the applicant is clearly irreparable. The respondents from the papers filed of record have been in occupation of the property in issue for a long time. Such occupation has been in excess of 13 years, 11 years of which the applicant spent in legal proceedings for ejection of the respondents. During the period when the legal proceedings were pending the respondents did not pay any meaningful compensation to the applicant for the occupation of the property. As observed in the judgment subject to the appeals at one point the respondent paid rentals equivalent to the sum of USD 1.00. This was clearly unconscionable. The illegal occupation of the premises by the respondents is itself prejudicial to the applicant. The applicant being the legal owner is entitled to the retention of or possession of its asset given that its fleet has ballooned and have to rent premises from other property holders. Accordingly, the refusal to vacant the premises violates the applicant’s right to property which is enshrined in terms of section 71 (2) of the Constitution of Zimbabwe. See *Altem Enterprises P/L v Jones Sisk & Son P/L* 2013 (4) ZLR 125 (S) @ 131 where GARWE JA stated that:

“The position is settled that a tenant has no right to occupy property save in return for the payment of rent and that where there is no agreement on the amount of rent payable, the lessee is liable to the lessor a reasonable amount for the use and occupation of the property, the rental value of the property in the open market being the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of the lease whilst negotiations for a new lease are in progress.”

In *casu* the applicant is not receiving anything meaningful for the property in question while the appeals are being processed and it is reasonable that the applicant be allowed to execute the judgment pending appeal.

THE PROSPECTS OF SUCCESS ON APPEAL BY THE RESPONDENTS

The High Court in the judgment being appealed against determined the issue before it on the basis of the illegality of the agreement. The court was presented with an affidavit attested to by the second respondent who was the Managing Director of the first respondent in which the second respondent said that he paid the sum of USD 20 000.00 to the corrupt officers of the applicant in order to induce the renewal of the lease agreement. The court rightfully found that such conduct was clearly illegal and could not result in a valid or binding lease agreement. I share the same sentiments that anything done corruptly or illegally cannot be held to valid. The reasoning of the court *a quo* in this regard cannot be faulted regard being had to the fact that corruption is a cancer that is difficult to eradicate in our society. The appeal court in my view would not uphold such a practice hence the prospects of success on appeal by the respondents are next to nil.

THE BALANCE OF HARDSHIP OR CONVINIENCE

In view of the fact that there is no hardship or prejudice which will befall the respondents but the applicant, the property in issue must be returned to the owner pending the determination of the frivolous and vexatious appeals which have been filed by the respondents. In the result I will grant an order for the ejection of the respondents pending the determination of the appeals they have filed with costs on an attorney and client scale.

IT IS ORDERED THAT

1. Leave is be and hereby granted for the Applicant to execute the judgment of this Honourable Court in case number HC 5501/06 (HH 238/17) pending the determination of the appeals filed by the Respondents in case number SC 289/17.

2. Accordingly, leave be and is hereby granted for the Applicant to issue a writ of execution for the ejection of the Respondents or any persons claiming occupation through them from number 9 Hood Road, Southerton, Harare.
3. The respondents shall pay the costs of this suit jointly and severally the one paying the other to be absolved on attorney and client scale.

Magwaliba & Kwirira, applicant's legal practitioners
Atherstone And Cook, 1st respondent's legal practitioners