

PEDZISAI MIRIAM LILLIETHY GARWE
versus
DANIEL GARWE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 5, 6, 9 & 11 July 2018

Urgent Chamber Application

F Mahere, for the applicant
L Madhuku, for the respondent.

CHITAKUNYE J. The applicant approached this court on a certificate of urgency seeking leave to execute an order granted by this court in HC 4882/18 pending appeal.

The applicant and respondent are wife and husband. Their marriage is on the rocks hence an action for divorce is pending in this court. During the subsistence of their marriage the parties conducted family businesses through and held family assets in family companies and family trust; namely, Planet Building Contractors (Pvt) Ltd; Hestream Enterprises (Pvt) Ltd; Macheke Motors (Pvt) Ltd t/a Sebakwe Range Farm.; Kudakawashe and Tafadzwa Garwe Family Trust.

In the divorce action the issue of what constitutes assets of the spouses is contentious. On the 15th June 2018, the applicant obtained a court order under case no. HC 4882/18 against the respondent. That order, inter alia,

1. Interdicted the Respondent from taking, removing and or in any way disposing of any of the assets held under the family companies and family Trust; and
2. Ordered Respondent to return forthwith all the assets he removed from Subdivision D of Rhodesdale, Sebakwe of Subdivision A of Rhodesdale and Remainder of Xmas of Subdivision A of Rhodesdale also known as Sebakwe Range Farm and Planet Building Contractors(Pvt)Ltd, the family farm and family company respectively, until divorce proceedings in case No. HC 5020/18 has been finalized.

Instead of complying with the dictates of the order of the 15th June 2018, the respondent noted an appeal against the order on the 28th June 2018. The notice of appeal was served on the applicant's legal practitioners on the 29th June 2018.

It was upon being served with the notice of appeal that applicant approached this court on a certificate of urgency seeking the enforcement of the order in HC 4882/18 pending appeal.

The applicant alleged, inter alia, that the appeal was noted to simply suspend execution so that respondent can continue to take and remove the assets in issue which are subject of the divorce action to the prejudice of the applicant.

The respondent opposed the application. In his opposition he contended , inter alia that the order sought will irreparably harm respondent as this will bring an abrupt stop to the business activities of the companies thereby crippling the source of livelihood for respondent, and the entire family.

It is an acceptable common law principle that an appeal automatically suspends the judgment appealed against unless the particular legal provision applicable to a particular case states otherwise.

The rationale is easy to understand in that if execution was to proceed despite the noting of an appeal, the appeal would be rendered of an academic interest only as the judgment and effect thereof sought to be set aside will have been executed. It will be *brutum fulmen*. Leave to execute pending appeal is thus an exception to the general rule. Court has discretion to grant or refuse to grant leave to execute pending appeal. In order to grant court must be satisfied that it is just and equitable in all the circumstances to do so. Court must judiciously weigh the interest of both parties in deciding the issue.

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534(A) at 545D-F CORBETT JA aptly stated the factors to have regard to in the exercise of the court's discretion as follows:

“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 if leave to execute were to be granted.
2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal 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 bona fide intention of seeking to

reverse the judgement but for some indirect purpose e.g. to gain time or 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 maybe.”

See also *Kyriakos & Kyriakos v Chasi & Others* 2003 (2) ZLR 399(H); *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61(H).

1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted.

In order to determine the above issue it is pertinent to note the order in question. The order required respondent to secure the knowledge and consent of the applicant in his dealing with the assets in question.

Clause 1 for instance required respondent not to remove or in any way dispose of any assets held under the family companies and family trust listed in the interim granted pending the finalisation of the divorce case. The execution of that clause would merely be ensuring compliance with that clause.

Clause 2 required respondent to return the assets that he had removed from Sebakwe Range Farm without the knowledge and consent of the applicant.

Clause 3 required respondent not to remove listed items from Sebakwe Range Farm without the knowledge and consent of the applicant.

Clause 4 was an order for respondent to return forthwith assets to no 12 Mitchel Road Kamfinsa, Greendale Harare which he had removed without the knowledge and consent of the applicant.

Lastly, clause 5 prohibited the respondent from removing listed items from number 12 Mitchel Road Kamfinsa Greendale, Harare without the knowledge and consent of the applicant.

It was thus upon the respondent to show that such an order if executed would cause him irreparable harm. In this regard respondent contended that the assets that he removed were on commercial hire so as to earn income for the family and others had been taken for repairs so that they were in a state to be leased out for profit. It is in this regard that he contended that the nature of the order would be to freeze the commercial activities of the respondent. By such freeze, income will be lost and business contracts he had already entered into would be broken leading to potential law suits for breach of contract. The respondent could not however prove before MUSHORE J who granted the order in question that he had

entered into any lease agreement with any 3rd party. This was despite having been given a week's period within which to bring the alleged lease agreements. Even in this application, respondent failed to include in his notice of opposition any lease agreement with the entity he had alleged he had leased the assets to namely Thembisa Investments (pvt) ltd. Instead when pushed to the corner he produced purchase orders generated by himself and alleged these were proof of lease agreements. But, as with any desperate efforts, these were not only unprocedurally tendered but were irrelevant as they did not pertain to the entity respondent had said he had leased the property to. So having failed to produce lease agreement in HC 4882/18 respondent had nothing to convince anyone with that he had indeed leased out the assets in the usual business operations of the companies.

As regards the assets that he was ordered not to remove from the stated premises respondent lamentably failed to show how enforcing such an order would cause him irreparable harm. If anything the order saved to preserve the property against abuse by respondent. Preservation of assets cannot be said to cause irreparable harm.

It may also be noted that what was required of respondent if at all he had bona fide business intentions was to obtain applicant's consent before leasing out any of the assets to a third party or removing the property from the stated premises. Surely seeking the consent of applicant, who respondent acknowledged was also party to the family companies and trust, cannot be said to cause irreparable harm to the respondent. Instead respondent seemed to want to enjoy an unfettered free rein to do as he pleased with the assets, without accounting to the other parties to the family Companies and Trust. If being asked to inform other parties and obtaining their consent before removing assets of the family companies and trust is what respondent views as potential irreparable harm then let it be so.

2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused.

The applicant argued that she would suffer irreparable harm if leave to execute is refused in that the respondent will dispose of the property as he had already started doing and that by the time the appeal is heard or the divorce matter is concluded, respondent would have removed the assets and put them beyond reach.

I am of the view that the harm to be suffered by applicant was evident from respondent's failure to show that he has indeed leased out the assets that he has already removed from the stated premises. Not only has he failed to prove such lease, but he also has

not even shown that any income has come through since the so called lease agreements were entered into.

The applicant as party to the family companies and Trust is surely entitled to know what is happening to assets of the companies and the trust. Somehow respondent does not want her to know for reasons best known to himself. I am of the view that the applicant's fear that respondent will dissipate the assets before the appeal is finalised is real.

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 bona fide intention of seeking to reverse the judgement but for some indirect purpose e.g. to gain time or harass the other party.

The issue of prospects of success on appeal is hinged on what respondent placed before the judge in HC 4882/18 as proof of lease agreements. This he failed to do.

Whilst it is indeed true that a company is a separate legal entity from the shareholders who in this case are husband and wife. There are instances where the corporate veil has been lifted and assets distributed between spouses at the dissolution of the marriage.

In *Gonye v Gonye* 2009(1) ZLR 232(SC) at page 233 the Supreme Court held that:

“Where the issue arises of whether the property rights, a proportion of the value of which is claimed by the one of the spouses, in reality lay with the other spouse or a company run by him, it is permissible to ‘lift the corporate veil’ in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. Where the company can be said to be the spouse's alter ego, the company's assets and proceeds can be said to be the spouse's and thus can be subject of an order under s 7(1).”

Further in *Sibanda v Sibanda* 2005 (1) ZLR 97 @ 103E-F The Supreme Court, whilst acknowledging the fact that a company duly incorporated is indeed a distinct legal entity endowed with its own legal personality went on to state that:

“However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and control of a company.”

See also *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216(H) and *Kwedza v Kwedza* HH34/12.

If therefore applicant will be able to prove the corporate veil be lifted then the assets may be distributed at the dissolution of the marriage. It is a fact that assets held in the name

of family companies and the companies themselves are issues for contestation in the divorce matter and it is only just that such assets be preserved pending such determination.

The purpose of such interdict is to prevent respondent from freely dealing with the property to the potential prejudice of the applicant.

See *Northern Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd & Another* 2013(2) ZLR 343(H).

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.

In determining this issue it is pertinent to point out that the irreparable harm respondent referred to, is no harm at all. It is in fact how things should be. Where husband and wife are the only share holders or trustees in a company, it is only fair and just that they obtain each other's consent in their operations. What the execution of the order entails is that respondent does not enjoy unfettered rein in the operations of the company but is enjoined to inform the applicant and obtain her consent if he is to remove assets owned by the family companies and family trust from Sebakwe Range farm and from 12 Mitchel Road Kamfinsa Greendale Harare. It is incorrect to say that by requiring respondent to consult a fellow share holder / director or trustee the business of the company will be frozen.

The applicant asked for costs on the higher scale on the basis that respondent's opposition to the order sought was a clear abuse of court process. Counsel for applicant alluded to the fact that on Friday 6th July when we met respondent had lied that he had a written lease agreement only to now claim that it was an oral agreement and to then tender documents that were not in the entity respondent had originally alleged to be the lessee. Whilst whether to grant leave or not is a matter of court's discretion, it is clear that respondent, it is clear to me that respondent's mission has not been a noble one. The bona fides of his opposition to an order that only required him to obtain the consent of applicant was without merit.

The respondent clearly seeks to have things his own way. It is because of the selfish attitude that parties found themselves before me. I am of the view that this is a proper case for respondent to be ordered to pay applicant's costs on the legal practitioner and client scale

As what is sought is preservation of the assets subject of a dispute before this court I am of the view that this is an appropriate case to also order that any appeal against this order

should not have the effect of suspending its operation as that may give respondent the leeway to remove the property without applicants consent or even knowledge thereof.

Accordingly the application is hereby granted as follows;

It is hereby ordered that:

1. Leave to execute the order of this court in case number HC 4882/18 be and is hereby granted.
2. This order shall remain operational and shall not be suspended by any appeal that may be lodged against it.
3. The respondent shall bear the costs of this application on the legal practitioner and client scale.

T H Chitapi & Associates, applicant's legal practitioners.
Mundia & Mudhara, respondent's legal practitioners