INSAAF INVESTMENTS (PVT) LTD
versus
CHATPRIL ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 May 2023

Court Application – Leave to Execute Pending Appeal

J Mapuranga with M D Hungwe, for the applicant
F Nyamanyaro, for the respondent

CHITAPI J: In case No. HC 6193/20 I rendered a judgment ref HH 898/22 on 29 December 2022. The parties herein were applicant and respondent. In the said case the applicant as owner of a property occupied on lease by the respondent claimed for an order with costs for *vindication* of its property from the respondent and for the respondents' ejection or eviction from the property. The property in issue is described as stand 22 Julius Nyerere way Harare. In my judgment aforesaid, I found for the applicant and granted its prayer. The respondent not being satisfied with my judgment noted to the Supreme Court, an appeal against the whole of my judgment. The appeal notice was accepted and is pending in that court under reference SC 2/23.

The date of filing the appeal is not legible on the copy attached by the applicant to its application. The notice of appeal is however dated 30 December 2022. Neither the applicant nor the respondent in their affidavits alluded to the actual date on which the appeal was noted. It is self-defeating for a litigant or counsel to settle papers intended to be used in advancing or defending a claim by including ineligible documents. Rule 58 of the High Court Rules, 2021 requires that an affidavit filed with every written application should be legible. The same must obtain in relation to annexures accompanying those affidavits because they form part and parcel of the affidavits. In this case had argument been raised upon the issue of whether an appeal had in fact been filed, it would present problems for the court to ascertain that fact. Parties and

counsel should always ensure that every pleading filed of record is legible. It is after all a matter of common sense and logic that a party that files affidavits pleadings and annexures intends that the court must have regard to them. If therefore one files an ineligible document then that document is useless as evidence and the party who has done so will only have him/herself to blame if it fails to make a successful claim or defence as the case maybe because the court has disregarded the ineligible document.

It is not proper for counsel to then seek to avail a "clearer copy" or produce the original during the hearing. After all the application is determined on the bound, referenced and paginated papers. Allowing the production over the bar necessarily entails that the papers are repaginated because the one produced over the bar cannot be allowed to float outside. The other paginated papers. The hearing would have to be postponed or held over so that the pagination is corrected if the other party has no objection. The party at fault should depending on the circumstances of each case and the discretion of the court shoulder wasted costs. In the case of a represented litigant consideration may be given to ordering counsel who filed ineligible documents to personally pay the wasted costs.

The digression on ineligible documents filed in court aside, in this application, it was common cause that the notice of appeal was timeously filed. No issues arose therefrom. The grounds of appeal are four in number and are listed in the notice of appeal as:

"**GROUND OF APPEAL**

The appeal is founded on the following grounds:-

1. The court *a quo* erred and misdirected itself in granting a claim for *actio rei vindicatio* in a matter where a valid lease existed between the parties.
2. The court *a quo* erred and misdirected itself in granting the Respondent's claim without addressing the aspect of letters from the City of Harare that contradicted as to the status of the building
3. The court *a quo* erred and misdirected itself in disregarding that Appellant's evidence to the effect that new tenants had actually been offered leases well after the Appellant had been a notice thereby contradicting the Respondent's position that, it required the building to carry out renovations
4. The court *a quo* erred and misdirected itself in placing the ……..on the Defendant to prove that other tenants occupying other parts of the same premises were not given notices to vacate the premises when it was the Respondent's obligation to prove that it had not selectively issued notices as the whole building was due for renovations as per its notice to the Appellant."

The applicant upon being served with the notice of appeal considered the grounds of appeal to be without merit and that there were no reasonable prospects that the Supreme Court would set aside judgment HH 898/22. The applicant was consequently advised to file this application for an order to execute judgment HH 898/22 pending the determination of the pending appeal No. SC 2/2003. That sums up the background to this application.

The law that governs an application for leave to execute pending appeal is settled. In the case of *Netone Cellular (Pvt) Ltd* v *56 Netone Employees 2*005(1) ZLR 275(5) CHIDYAUSIKU CJ interrogated the principles which govern the determination of an application for leave to execute a judgment pending appeal. The learned Chief Justice stated at p 280 H-281 D.

> "……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 conditions upon which the right shall be exercised. See Voet 49-7.3; *Ruby's Cash Store (Pvt) Ltd* v *Estate Marks and* Anor supa at 127. This discretion is part and parcel of the inherent jurisdiction which the court has to control its judgments *CF Fismer* v *Thorntoa*. 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 an 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 an appeal (applicant in the application) if leave were to be refused
> (3) the prospects of success on appeal including more particularly the question as to whether the appeal is ……..vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose for example to gain time to harass the other party; and
> (4) where there is potentiality of irreparable harm or prejudice to both the appellant and respondent the balance of hardship or convenience, as the case may be"

Various judgments of this court have taken the quoted guide. For example: *Rensberg* v *Ngirandu* and 3 Ors MTHC 12/21 *Nzara* v *Tsanyare* HH 303/14; *AFM* v Chiangwa HH 626/21 *ZCFU* v *Gambara* HH 375/15.

From the listed factors which must be considered cumulatively (see *Amalgamated Rural Teachers Union of Zimbabwe and Anor* v *Zimbabwe African National Union* HMA 37/18) the onus to establish on a balance of probabilities that it is fair and just for the court to grant an order of execution pending appeal lies on the applicant. In respect of what constitutes irreparable harm, the circumstances and facts of each case under consideration define the irreparable harm which the applicant or respondent as the case may be may potentially suffer. By definition however, in the case of *Moller N.O and Anor* v *Murray N O and Ors* Case No 2308/2021, MASHILE J sitting in the High Court at Mpumalanga, Mbombela, South Africa stated in para 16

p 7 of his cyclostyled judgment as follows in reference to defining "apprehension of irreparable harm" in the context of an application for an interim interdict and I would say the definition aptly applies in this application:

> "**APPREHENSION OF IRREPARABLE HARM**
> (16) ……Irreparable harm or loss is the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial loss, it may consist of an irremediable breach of the applicants rights *Braham* v *Hood* 1956(1) SA 65 D at 655 B and *Cliff* v *Electronic Media Network (Pvt) Ltd Anor* 2016(2). All SA 102 (GJ)."

In Ontario superior court in the case of *Jeasundaram* v *Vadivale* 2021 ONSC 4505 (CANL II), 3 RJR Macdonald stated at para 68 of his judgment:

> "[68] Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms, or which cannot be cured; usually because one party cannot collect damages from the other."

In the same case at para 69, the learned stated:

> "[69] Irreparable harm may arise from eviction but there must be some evidence aside from a bold assertion…"

It therefore seems to me that irreparable harm should not be assumed. It should be established or demonstrated by some acceptable evidential material. Irreparable harm will be that nature of harm not capable of recompense or remediable by any monetary award of damages. This is unlikely to be so in cases of eviction in a terminated landlord (tenancy relationship as *in casu* because the relationship between the parties is defined by the fact of the landlord letting out a property to the tenant who pays rental. Applying the principle that it is the nature of the harm and not its magnitude that defines irreparable harm, then the issue becomes one where the nature of the harm to the respondent is the cost of obtaining alternative premises. For the applicant it is the failure to renovate and upgrade its premises to modern standards as per approved plans which the respondent did not dispute.

In the case whose judgment was appeal against, the issues for trial wee two in number stated as follows:

> "1. Whether or not a valid notice of appeal to vacate the premises was issued by plaintiff (applicant herein) to the defendant (respondent herein).
>
> 2. Whether or not plaintiff is entitled to vindicate its property from the defendant.:

In the judgment the court determined that the respondent had pleaded in the plea that it was a statutory tenant but had shifted positions in evidence and sought to argue that it was a tenant in terms of a lease agreement which was still current. The court noted that a party is bound by its pleadings and may not depart from them without amending or withdrawing them. Consequently, the finding was made that the respondent was a statutory tenant as pleaded in the declaration and admitted in the plea. The respondent had pleaded that the notice to vacate was invalid. The respondent did not deny in its plea that the renovations were justified but pleaded that they related to stand 57 Julius Nyerere Way yet the respondent occupied stand 22 Julius Nyerere Way.

The court determined that the notice to vacate was validly given in a letter dated 8 July 2020. The court noted that the respondent's legal practitioners responded to the notice letter on 10 July 2020. They did not raise the issue of the alleged invalidity of the notice nor question the alleged need for the applicant to effect renovations. In the replying letter aforesaid, the respondent averred that the intended renovations and inspections made by City Council related to stand 57 which differed from stand 22. The court agreed with the evidence of the applicant that the property referred to as stand 22 and stand 57 was the same and adjourned Julius Nyerere Way where there was an access entrance with the other entrance access being located in Rezende Street. Therefore the property when accessing it from Rezende Street would be described as 22 Rezende Street and 57 Julius Nyerere Way if accessed from that street.

The court accepted the genuineness of the applicant to renovate and modernize the property. The approved renovations plans whose authenticity was not disputed by the respondent would alter the outlook of the property and increase the number of shops hence creating added value for the owner. The onus to cast doubt on the genuineness of lessor's claim that it needs the recovery of the property was reposed in the respondent on the strength of the authority of *Kingstons Ltd* v *Ineson (Pvt) Ltd* 2006 (1) ZLR 451. It was common cause that the local authority had by letter addressed to the owner described the property known as Stans 75 Rezende Street as dilapidated and unsightly. The respondent argued that it occupied stand 22 Julius Nyerere and that the letter did not relate to its occupied space. It also argued that other tenants were not being sued. However, the undisputed facts were that the applicant as owner had decided to completely revamp the premises per approved plan. It would not be sufficient to

resist eviction for the respondent to argue that "why me being sued first. Sue all of us at once" or to argue that the respondent as tenant attended on making the building or occupied space sightly and even then without the authority or knowledge of the applicant as owner and lessor.

The respondent had also sought to resist eviction on the grounds of the invalidity of the notice to vacate. Its argument was that the notice to rectify the building related to a different property from the one it occupied. It averred that the property it occupied was stand 57 Rezende Street and sought to differentiate it from stand 22 Julius Nyerere Way. The argument did not see light of day in view of the court's acceptance of the evidence given on behalf of the applicant and not seriously disputed by the respondent that the property was the same. The difference in address depended on whether one entered the property from Julius Nyerere Way or from Rezende Street. It was not argued that the notice given was inadequate. The respondent must have been aware that if its argument on identity of the property as a ground for challenging the validity of notice failed, then the notice would stand valid in terms of the regulations at play.

I have carefully considered the grounds of appeal on which the respondent relied to seek the setting aside of this court's judgment. It is of course the function of the Supreme Court to give an authoritative, definitive and final judgment on the grounds of appeal and to set aside or uphold the judgment. This court considers the proposed grounds of appeal from a guarded and guided position. It considers the prospects of success of those grounds and expresses its opinion thereon.

In relation to the first ground of appeal, the criticism that the court erred and was misdirected to grant an order of *rei vindication* when there was an existing lease agreement amounts to a defence in *terrorum* because the plea of the defendant was that it was a statutory tenant. Tenancy under a statutory tenant does not depend upon an existing lease agreement. It arises following the expiry of a lease agreement which has not been renewed. There was clearly no existing lease agreement: None was produced and the court dealt with the issue when it pointed out in the judgment that the main issue was whether or not the applicant had proved a case for the repossession of its property. This ground is devoid of merit and has not prospects of succeeding.

The second ground of appeal is that the court erred in addressing the letters from City of Harare which contradicted the status of the building in question. The issue was dealt with comprehensively on pp 10 to 11 of the cyclostyled judgement. Significantly at p 11 the court dealt with the evidence of alleged rectifications to the property made by the respondent. The court was alive to the evidence of the respondent to the effect that it effected rectifications to the building which resulted in City of Harare writing a letter to state that the premises occupied by the respondent had been inspected and found to be by-law compliant. However, this was not the issue. The issue was not about the renovations done by the respondent which in any event were neither outlined nor pleaded by the respondent other than by word of mouth. The issue was whether the applicant had established a case for the relief that it repossesses its property from the respondent for purposes of effecting the structural changes per the approved undisputed plan. This ground of appeal has no merit or prospects of success. It is based upon a false premise that the court did not deal with the evidence concerned and to that extent there could not have been a misdirection of the nature pleaded in the second ground of appeal.

The third ground of appeal was that the court disregarded the respondent's evidence that other tenants had been granted or offered new leases after the respondent had been given notice and that this fact contradicted the applicants assession that it needed premises for its own use. Again the allegation is not correct because the court dealt with that evidence on p 13 of its judgements. The court reasoned that the allegation of new leases having been offered to other tenants which the applicants witness denied was a baseless assertion. The court also noted that there was no evidence placed before it to indicate that the other tenants were resisting giving up possession of the property to allow for renovations. Once a ground of appeal lies about the misdirection allegedly made by the court, the prospects of such erroneously grounded ground of appeal, wanes into insignificance or oblivion. There is therefore no prospect of the ground of appeal succeeding.

The fourth and last ground of appeal was that the court was misdirected to place an onus on the respondent to prove that other tenants occupying the same premises were not given notices to vacate. The respondent averred that it was the obligation of the applicant to prove that it did not selectively issue notices of eviction. This ground is a surprising one because it is assumed that the respondent's legal practitioner would be aware of the basic principle of proving

disputed facts that unless other basis of proof are provided by law, then the party that avers must prove. The allegation that other tenants were issued with new leases was generated by the respondent. If it was the respondents' contention that it was being treated differently from the other tenants. Whether or not the defence would succeed being beside the point, it was the respondent which was required to prove the assertion that it was only it that had been given notice to vacate . The applicant was not suing all the tenants and did not have any duty or onus to show that he gave notice to each and all tenants. The attention of the respondents counsel is drawn to the Kingstons Ltd case (supra) which clearly states that it is the lease who resists eviction who must bring forward facts and circumstances to cast doubt on the lessor's claim . There is no prospect of this ground of appeal succeeding either.

Lastly I deal with the balance of convenience. The applicant averred that it would suffer irreparable harm were execution pending appeal be not granted. The respondent similarly made a like claim. The applicant is the owner of the property and has guaranteed ownership right which include building on its property. It already to renovate the property to modern standards and also derive increased income from it. It a heady has an approved plan which it wants to put to work now. The respondent averred that it was the one which stood to suffer irreparable harm because once evicted it is not possible to re- occupy the premises. In my view it would be its choice to return or not to should its appeal succeed. It must have dawned on the respondent that right from the onset when the notice to vacate was given, through to the issue of summons the possibility existed that its occupancy which was then under challenge carried the risk that it could lose the right of occupancy. The potentiality for harm should have been and was apparent therefore and has remained there. Being evicted is an anticipated consequence of eviction proceeding and if there can be irreparable harm alleged, then it is an inevitable consequence in eviction proceedings.

The respondent averred that the applicant continues to receive rentals from the respondent and consequently did not stand to suffer any prejudice. It averred that if execution pending appeal is granted, the respondent would shut down its business until the outcome of the appeal. This submission is difficult to appreciate because what essentially the respondent is pleading is that there is no prejudice when rent is being paid. The issue in the matter was not about rentals or their adequacy but renovations and modernization of premises. The prejudice to

be suffered by the applicant must be based upon what it means to it if it does not carry out its objects to renovate the premises.

In my view the balance of convenience favour the applicant as owner who has shown that it requires to carry out extensive renovations which will modernize its building and increase letting space. The respondent's appeal does not have prospects of success as I have demonstrated. The resistance of the respondent to vacate the premises is not based upon any sound legal basis and even the grounds of appeal make false or inaccurate allegations about perceived misdirection's by the court. A proper case for the grant of leave to execute pending appeal has been established.

On costs, the applicant sought costs on the punitive scale of legal practitioner and client. The applicant did not lay a basis and grounds to justify such scale of costs. In such a case the general rule that costs follow the event applies.

The application is determined as follows:

IT IS ORDERED THAT

1. Leave to execute judgment in case No HC 6193/20 pending the determination of appeal No SC 2/23 is granted.
2. The respondent to pay the Costs.

Kadzere, Hugwe and Maneuverer, applicant's legal practitioners
Farainyamanyaro Law Chambers, respondent's legal practitioners