

STREAMSLEAGH INVESTMENTS (PRIVATE) LIMITED
v
AUTOBAND INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 16 & 23, 2014

A.P. de Bourbon SC, for the applicant

L. Uriri, for the respondent

An application to execute notwithstanding the filing of a notice of appeal to the Constitutional Court.

Before **GARWE JA**, in chambers.

In a matter involving the same parties, this Court in SC 43/14 (per Gowora JA, with Malaba DCJ and Garwe JA concurring) allowed with costs the appeal noted by Streamsleagh Investments (Pvt) Ltd (“the applicant”), set aside the judgment of the court *a quo* and in its place issued the following order:

- “(a) The eviction order granted by the Magistrates Court Harare, in the matter between *Autoband Investments (Private) Limited t/a Trauma Centre v African Medical Investments Plc* under Case No. MC 16435/11 be and is hereby declared to be of no force, effect and application as against the applicant.
- (b) It is ordered that the applicant be and is hereby restored to possession and occupation of premises known as Stand 2924 Salisbury Township of Salisbury Township Lands situated at Number 15 Lanark Road Belgravia, Harare.

- (c) It is ordered that the respondent pays the costs of this application on a legal practitioner client scale.”

Following this order, the applicant issued a writ for the ejectment of Autoband Investments (Pvt) Ltd (“the respondent”) from the premises known as Stand 2924 Salisbury Township of Salisbury Township Lands, also known as number 15 Lanark Road, Belgravia.

However on 18 June 2014, i.e. a day after the handing down of the Supreme Court judgment, the respondent, acting in terms of s 167 (5) of the Constitution of Zimbabwe, filed a notice of appeal to the Constitutional Court of Zimbabwe against the whole judgment of the Supreme Court. The grounds contained in the notice of appeal are:

1. The Supreme Court erred in determining the merits of an appeal that is pending before the High Court, and in so doing infringed the appellant’s right to the equal protection and benefit of the law protected and guaranteed under section 56 (1) of the Constitution of Zimbabwe.
2. The Supreme Court denied the appellant the protection of the law in granting a substantive constitutive order, and not a purely declaratory order which had been prayed for.
3. To the extent that the appellant’s principal shareholder is the beneficial owner of the immovable property in question and to the further extent that an incident of ownership is the right to occupation, and to the even further extent that the effect of the Supreme Court judgment is to order the ejectment of the owner of the property, the appellant was deprived of the property rights protected and guaranteed under section 71 of the Constitution of Zimbabwe.

In its prayer the respondent seeks a declarator that its right to the protection of the law and to its proprietary rights has been infringed. It further seeks an order setting aside the judgment of the Supreme Court and in its stead substituting it with an order dismissing with costs the appeal noted to the Supreme Court.

Following the filing of the notice of appeal to the Constitutional Court by the respondent, the issue became moot whether in terms of the law such appeal had the effect of suspending the judgment of the Supreme Court. Indeed the Sheriff wrote to the applicant's legal practitioners on 20 June 2014 advising that his understanding was that the appeal had such an effect. The Sheriff was no doubt correct in his understanding of the law – see *South Cape Corp v Engineering Management Services* 1977 (3) S.A. 534, 544 H-545 A.

Faced with this development, the applicant filed, under a certificate of urgency, a chamber application seeking an order declaring the notice of appeal filed by the respondent with the Constitutional Court to be declared invalid and for execution to proceed notwithstanding the noting of that appeal.

The urgent applicant was heard by the Honourable Chief Justice in chambers and determined on 24 July 2014. In his determination the Chief Justice directed that the issues raised in the application be referred for determination by the full bench of the Constitutional court. However, he directed that the issue whether the respondent should be evicted from the premises, being urgent, be referred for determination on the same papers by any one of the Judges who heard the matter in the court *a quo*. Consequent to that directive, the matter was then referred to

me. What I am asked to determine is whether the respondent should be evicted from the premises notwithstanding the appeal it has launched in the Constitutional Court. It is also common cause that the respondent has filed another application with the Constitutional Court in which it cites itself and the present applicant as co-applicants.

The position is now settled that the court to which application for leave to execute is made has a wide discretion to grant or refuse leave. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. Further, in the exercise of such discretion, the court should determine what is just and equitable in all the circumstances and in doing so would normally have regard 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 the *bona fide* intention of seeking to reverse the judgment 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 may be.

The authority for the above proposition, if any is required, is *South Cape Corp v Engineering Management Services (supra)*, at 545 D-G.

It seems to me appropriate, for reasons that will become apparent shortly, that the prospects of success of the respondent on appeal before the Constitutional Court be determined first. In order to do so it is necessary to consider the findings made by this Court in arriving at the decision now the subject of the constitutional appeal.

The events that took place and gave rise to the present proceedings were predicated on an order made by the Magistrates Court. It was on the basis of that order that the applicant was evicted from the premises. After considering the various submissions made by counsel and documents produced in the Court *a quo*, this Court formed the view that the critical issue that required resolution was whether or not it was AMI Plc or Streamsleagh (Pvt) Ltd (the current applicant) which was in occupation at the time eviction was ordered by the Magistrates Court and, secondly, whether spoliation had been proved. At page 9 of the judgment, this Court remarked:

“Where an act of spoliation has been alleged, it is trite that the act of spoliation has to be proved. The respondent did not state when such act occurred or by whom it was perpetrated. In his founding affidavit Dr. Solanki refers in general terms to “robbery, theft, corruption and fraud” as constituting the act of spoliation. It cannot be gainsaid that robbery, theft, corruption and fraud are different and distinct species of criminal offences The respondent does not, in the affidavit of Solanki, give details on each of the alleged offences nor does he state how each of these acts which are alleged to constitute spoliation were effected, when they occurred or by whom they were perpetrated. In short, the affidavit is devoid of any specifics on the act of spoliation in terms of which the order was premised. It is lacking in detail and substance as to how the respondent was illegally dispossessed of occupation.”

At page 11 of the cyclostyled judgment, the court continued:-

“It was necessary, in my view, for the respondent to have shown that it was in occupation of the premises in question and further to that it was, in fact, the appellant, as opposed to AMI Plc that caused its unlawful dispossession from the premises. It did not establish that it was in peaceful and undisturbed possession and that it was despoiled by the

appellant. Consequently, there is no substance to the allegation by the respondent that it had been unlawfully dispossessed of occupation of the hospital premises by the AMI Plc against which it took no action.

I therefore conclude that the learned Judge misdirected himself in accepting the finding by the magistrate that the respondent had been unlawfully removed from the premises by AMI Plc.”

At page 13 this Court continued:

“Apart from the bald allegation that it was in possession, the respondent did not, before the magistrate or the High Court, establish proof of its occupation of the disputed premises. The affidavit from Solanki suggests that he occupied No. 15 Lanark Road in his personal capacity, which, given the documents in the record, is an obvious lie. He was not in occupation, but was on the premises pursuant to the management agreement that got terminated, which termination he accepted.”

This Court also accepted that although aware that the applicant was in occupation of the hospital, the respondent had deliberately not cited the applicant but instead cited AMI Plc, a separate legal entity. This is what this Court said at page 12 of the judgment:

“Apart from the urgent chamber application referred to above, the parties also filed documents under Case No. HC 619/11. Again this application is at a standstill. The application in the Magistrates Court was filed on 28 September 2011. It is obvious that by the time the respondent filed the application in the Magistrates Court, it had become aware, from the documents filed in the two High Court applications mentioned above, that the appellant was in occupation of the hospital, yet it chose deliberately not to cite the appellant in the application for an order of spoliation.”

The court also found that no attempt had been made by the respondent to produce documentation to substantiate its claim that it was in occupation of the premises whose registered owner, it was common cause, was Streamsleagh (Pvt) Ltd, the applicant in this case. The Court further found that an order for the eviction of AMI Plc had no effect on the applicant as these

were two distinct entities and it was not suggested that the applicant had itself committed an act of spoliation or held the premises through AMI Plc.

My reading of the appeal by the respondent to the Constitutional Court does not suggest that the finding made by this Court that the order of eviction, directed as it was against AMI Plc but executed against the applicant, a separate legal entity, was irregular and therefore null and void, is impugned. On the basis of the papers presented before the Supreme Court, the position must be accepted that the order of spoliation granted in the Magistrates Court was most irregular. Consequently both the order of eviction itself as well as the order allowing execution notwithstanding the noting of an appeal were therefore a nullity. In short one must proceed on the basis that there never was a valid order of eviction in the first instance.

As a corollary therefore, the complaint that there was a violation of the right to the protection of the law is not sustainable and consequently the conclusion is inescapable that the respondent does not have any reasonable prospects of success against the judgment of the Supreme Court, whatever its submissions may be on the other issues raised in the application before the Constitutional Court.

Nor can the decision to re-instate the respondent be said to be irregular or to raise any constitutional issue. The reinstatement was a consequence of the finding that the eviction itself was null and void. The reinstatement was a restoration of the *status quo*, which this Court, in the exercise of its powers both under s 22 and s 25 of the Supreme Court Act [*Cap 7:13*] is clearly empowered to order. Section 25 (2) in particular empowers the Supreme Court to

exercise review powers at any stage whenever it comes to its attention that an irregularity has occurred in any proceedings, including proceedings that are not the subject of an appeal or application before it. The order of spoliation issued by the Magistrates court was clearly irregular and more so when regard is had to the fact that it was executed against a party not cited in the order itself.

On the potentiality of irreparable harm if leave to execute is not granted, clearly the balance of convenience favours the applicant. On the known facts, the applicant was evicted on the basis of an order which cited AMI Plc as the party despoiling and in circumstances where such spoliation had not been proved. The applicant was evicted in 2011 and clearly the potentiality of irreparable harm must be obvious.

In my view, it becomes unnecessary to consider the argument advanced by the applicant that the respondent had no right of appeal to the Constitutional Court against the decision of the Supreme Court in the absence of the court making findings on constitutional issues that arose before it.

In all the circumstances it appears to me that the opposition to this application was intended merely to delay execution of the judgment of this Court. An order of costs on the higher scale is warranted as prayed for by the applicant.

Out of an abundance of caution, I have brought the contents of this judgment to the attention of Malaba DCJ and Gowora JA, with whom I sat to hear the appeal that is now the

subject of the Constitutional application. Our decision at the conclusion of the appeal was unanimous. Both have authorized me to indicate that they are in full agreement with the conclusion arrived at in this judgment.

Accordingly it is ordered as follows:

1. The Application to execute the judgment of the Supreme Court in SC 43/14, notwithstanding the filing of an appeal to the Constitutional Court, be and is hereby granted.
2. The respondent is to pay the costs of this application on the scale of legal practitioner and client.

Messrs Mtetwa & Nyambirai, applicant's legal practitioners

Venturas & Samkange, respondent's legal practitioners