

TONY WEST REAL ESTATE
versus
VENENCIA MADAKE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 28 November 2012

Application for Leave to Execute Pending Appeal

J Mudimu, for applicant
G Nyandoro, for respondent

HUNGWE J: This is an application for leave to execute judgment pending the determination of an appeal against the judgment of this court dated 24 January 2012. The background to this application is as follows:

The applicant leased to the respondent an immovable property at 142 MbuyaNehanda Street, Harare in terms of a lease agreement. The applicant claimed for the respondent's ejectment from the premises in the magistrate's court. On 7 June 2011 that court granted the applicant's claim for ejectment together with the claim relating to arrear rentals upon finding that the respondent was in breach of the lease agreement. Aggrieved by this finding the respondent appealed to this court. This court did not find favour with the respondent's submissions on appeal and consequently dismissed the same. She filed an appeal with the Supreme Court.

In the meantime the applicant filed the present application on the basis that the respondent has no prospects of success on appeal and that the appeal by the respondent was a ploy to buy time at the expense of the applicant which continued to suffer serious financial prejudice.

At the hearing the respondent pointed out that the applicant's answering affidavit as well as the heads of argument had not been properly served in terms of the rules of this court. In particular the respondent pointed to the lack of a specific address of service on the certificate of service relied upon by the applicant in both instances. In reply to this point in *limine* the

applicant pointed out that service had been effected on the respondent's address in the Willowvale area of Harare hence she was present at court. In any event, if the respondent wished the matter to be decided on such technicalities, then the applicant would take the point that respondent's legal practitioner had not filed a notice of assumption of agency and therefore was not properly before the court.

In terms of Rule 4C of the High Court Rules, 1971, the court dispensed with the rules requiring the service of the applicant's documents and the requirement to file an assumption of agency so as to expedite the decision in this matter and allowed the matter to proceed on the merits.

The respondent's legal practitioner, Mr *Nyandoro*, submitted that in a case where the applicant had failed to demonstrate that the respondent's appeal was a hopeless one without any prospects of success, the applicant is not entitled to the order it seeks. An applicant for leave to execute judgment pending an appeal should demonstrate that the appeal lacked any prospects of success, so he argued. It is true that in general, the test in an application for leave to execute pending an appeal is whether or not the appeal has prospects of success.

I have read the reasons for judgment given by KARWI J in the judgment appealed against. I have also carefully considered the submissions made on behalf of the parties by their respective counsel. It is trite that under common law the execution of the order granted in the court *a quo* was automatically suspended by the noting of an appeal to this court. The subsequent appeal from the judgment of this court further suspended the execution of judgment of that order. What this means is that pending the determination of that appeal in the Supreme Court, the order could not be carried out besides with the leave of this court. In order to obtain such leave an application needs to be made by the applicant to this court: *Geffen v Strand Motors (Pvt) Ltd* 1962 R&N 259(SR) at 260; 1962 (3) SA 62 (SR).

The principles which must be applied by this court in determining the matter before it are those stated by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545:

"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 (the 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 (the applicant in the application) if leave to execute was refused;
- (3) the prospects of success on appeal, including more particularly the question of 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, eg, 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."

(See also *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152)

It was noted during argument that the respondent moved out of the property in question. I enquired of her counsel what effect this had on the present application. He submitted that this could not in any way serve to show that her prospects on appeal were dim. I agree but most importantly in my view if this is another way of demonstrating her faith in the strength of her case, it may well be inferred that she has taken a conscious decision not to incur further holding over damages for which she should be commended. This has not only reduced immensely the harm suffered by the applicant but also shown that she will suffer no hardship by an order to do that which she has already done; i.e relinquish her hold on the property. In my estimation of her prospects of success I have come to the inescapable conclusion that she had noted the appeal to buy time within which to ease out of the applicant's premises at her convenience. Her conduct is consistent with this conclusion. It is the applicant who would suffer further harm should the application be refused. These are the reasons why at the end of the hearing I granted the application for leave to execute pending appeal and indicated that the reasons will follow.

These are they.

Tavenhave & Machingauta, applicant's legal practitioners
Hamunakwadi, Nyandoro & Nyambuya, respondent's legal practitioners