

CHEMATRON PRODUCTS [PVT] LTD
versus
TENDA TRANSPORT [PVT] LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 11 September 2013 & 9 October 2013

Opposed application –leave to execute

C. Kuhuni, for applicant
T.K. Hove, for first respondent

MAFUSIRE J: In this country, unless otherwise provided, the noting of an appeal automatically suspends the execution of the judgment or decision appealed against: *Wood NO v Edwards & Anor* 1966 RLR 336 (G) (per LEWIS J). It is the same in South Africa: *Oliphant's Tin 'B' Syndicate v de Jager* 1912 AD 474 @ p 487; *Verkouteren v Savage* 1919 AD 183 @ p 184; *Malan v Tollekin* 1931 CPD 214; *Reid v Godart* 1938 AD 511; *Levin v Felt and Tweeds Limited* 1951 (1) 213 @ p 217 and *Geffen v Strand Motors (Private) Limited* 1962 (3) SA 62.

The party that succeeds in the court of first instance has to seek the leave of the court to execute the judgment whilst the appeal is pending. This is a common law rule of practice. In *Levin's* case above VAN WINSEN AJ, at p 217F, explained the rule as follows:

“The common law is clear that a notice of appeal, save in certain exceptional cases, automatically suspends the execution of the judgment appealed against. No application is necessary to ensure this result. If the party who succeeds in the judgment against which the notice of appeal has been lodged wishes to execute upon the judgment, then it is he who is required to make an application to do so.”

The rationale for the common-law rule is that there is need to prevent an irreparable damage from being caused to the appellant. In *Reid's* case above De VILLIERS JA said, at p 513:

“Now, by Roman-Dutch Law, the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out; and no effect can be given thereto, whether the judgment be one for money (on which a writ can be issued and levy made) or for any other thing or any form of relief granted by the court appealed from. The foundation of the common-law rule as to suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy, under a writ, or by the execution in any other manner appropriate to the nature of the judgment appealed from.”

CORBETT JA put it as follows in *South Cape Corporation v Engineering Management Services* 1977 (3) SA 534 (A) at pp 544:

“... it is today the accepted common law rule of practice in our court that generally the execution of a judgment is automatically suspended upon the noting of an appeal... The purpose of the rule is to prevent irreparable damage from being done to the intended appellant.”

If the purpose of the rule is to prevent an irreparable damage from being caused to the intended appellant, the automatic suspension of the judgment or decision appealed against may equally cause an irreparable injustice or harm to the respondent who would have been the successful party. It is him who is prevented from enjoying the fruits of his success in the court of first instance. SMITH J criticised the rule in *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (HC). He noted that the position was the other way round in England. In England an appeal does not automatically suspend the execution of the judgment appealed against. The intending appellant must apply and show special circumstances for the execution to be stayed. The rationale for the English position is that a successful litigant should not be deprived of the fruits of his litigation: *The Annot Lyle* (1886) 11 PD 114 (CA) and *Monk v Bartram* [1891] 1 QB 346.

In the *Econet* case SMITH J. proposed a change in our law. At p 157 he stated as follows:

“It seems to me that there would be merit in changing our law on this aspect so as to follow the English system. If a party has obtained a judgment or order from a court of first instance, then *prima facie* that party should be entitled to the benefit of that judgment or order. It should be for the unsuccessful party to have to seek leave for the judgment to be suspended if an appeal is noted. That party should be the one required to show that special circumstances exist which justify the suspension sought. The

system that prevails in Zimbabwe must have the effect of encouraging some debtors or persons with doubtful claims to appeal simply in order to play for time, as in this case. In other words, since an appeal automatically suspends execution, a debtor who wants to delay may as well appeal even if he knows the appeal is hopeless or even if he knows that he will abandon it. At least it will buy him time.”

I agree with the learned judge. Our rule in a way encourages an abuse of the court process. In practice a party that loses the first round in the court of first instance is less likely to want to press for the expeditious determination of the appeal, especially as the outcome is uncertain. Thus given the inevitable and often inordinate delays experienced in the appeal process, the appellant is often content to let matters drag on and in the process frustrate the respondent who was the successful party. The respondent has to wait patiently before he can enjoy the fruits of his success. The situation can be quite desperate in eviction cases. Where the landlord obtains an order for the ejection of the tenant from the rented premises for which the tenant is not paying rent and the tenant appeals the order the landlord can be stuck with the intransigent tenant for months on end, even years, unless he obtains leave to execute.

SMITH J. noted with interest that the situation obtaining in the English legal system has been adopted in Zimbabwe in maintenance cases. In terms of s 27 (3) of the Maintenance Act, *Cap 5: 09*, the noting of an appeal against a decision of a maintenance court does not, whilst the appeal is pending, suspend the decision appealed against unless the maintenance court, on application, directs otherwise.

I too note with interest that the English position has also been extended to labour matters. The Labour Act, *Cap 28: 01*, in different sections, provides for appeals to the Labour Court and for appeals to the Supreme Court. Section 92E, a 2005 amendment, then provides that an appeal in terms of that Act shall not have the effect of suspending the determination or decision appealed against. The Labour Court is empowered, on application, to make interim determinations on matters pending before it on appeal. In practice these include applications for stay of execution pending appeal.

SMITH J. in the *Econet*, case concluded by recommending the wholesale adoption of the English position. At p 157 of his judgment he said:

“I would recommend that consideration be given to amending the law insofar as it provides for the automatic suspension of the execution of any judgment or order granted by the High Court or the Magistrates Court where an appeal is noted.”

I support such recommendation.

The present application is a typical application for leave to execute pending appeal. There was a trial in 2006. The applicant was the plaintiff. The first respondent was the defendant. The applicant sought specific performance. It said it had bought a property from the first respondent. It said it had paid the agreed purchase price. The first respondent contested the claim. It said there had never been any valid agreement between the parties or that if there had been one then such agreement had been cancelled because of a breach by the applicant. At the conclusion of the trial this court, BERE J, *inter alia*, granted the order for specific performance but reserved his reasons. It was only three years later, in February 2012, that those reasons were made available.

Upon receipt of the reasons for judgment the first respondent appealed to the Supreme Court. It had applied to the Supreme Court for the condonation of the late noting of the appeal. Although neither the application for condonation nor the order of the Supreme Court was placed before me it was common cause that condonation had been granted.

Slightly over a month after the first respondent had noted the appeal, the applicant applied for leave to execute. The applicant sought the same order for specific performance as it had sought at the trial, namely that the first respondent should be ordered to transfer the property in question to it failing which the Sheriff for this court, or his lawful deputy, should be authorised and empowered to do so. The applicant based its application on the ground that it continued to suffer considerable prejudice by not having the property registered in its name when it could mortgage it to raise finance for its business operations. The applicant also attacked the propriety of the first respondent's appeal. It said the appeal was frivolous and vexatious, a ploy to buy time and one simply meant to harass the applicant because it had no prospects of success.

On the other hand the first respondent opposed the application. It relied chiefly on its grounds of appeal. They were as follows:

- (1) That the learned judge had erred by holding that the applicant had proved its case on a balance of probabilities;
- (2) That no due weight had been placed on the fact that the applicant had breached the terms of the original agreement of sale between the parties;
- (3) That no due weight had been placed on the fact that there had been no valid and binding agreement of sale between the parties;

- (4) That the court had erred by not taking due cognizance of the fact that there had been no resolution by the respective boards of the parties authorising the sale of the property.

On the question of the lack of merit of the appeal the first respondent argued, among other things, that the Supreme Court had granted condonation for the late noting of the appeal on the same facts and that therefore that court must have accepted that the appeal had prospects of success.

The applicant objected to the first respondent's inclusion of ground no (4) above in its ground of opposition on the basis that such ground had not been part of the issues for trial. Apparently none of the parties' counsel had been involved in the trial. Mr *Hove*, for the first respondent, submitted from the bar that he had perused the trial record and had noted that the aspect of the lack of board resolutions by either party had been one of the issues for trial but that the learned trial judge had omitted it in his judgment. However, Mr *Hove* conceded that nothing had been placed before me in the present application to back him up on that point. I shall revert to this aspect later on in my judgment.

Both parties were alive to the requirements for an application for leave to execute as they not only dealt with them in the affidavits but also in argument.

The court has an inherent power to control its own process. Thus, in the exercise of its wide discretion it can order the stay of execution of its judgment or order that the judgment be carried into execution. The court strives to achieve real and substantial justice. In *Santam Insurance Company Limited v Paget (2)* 1981 ZLR 132 GUBBAY J, as he then was, stated as follows, at pp134 - 135:

“As observed by GOLDIN, J., as he then was, in *Cohen v Cohen (1)*, 1979 R.L.R. 184 (G.D.); 1979 (3) S.A. 420 (R.) at 423 B – C, the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore in the execution of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham v. Graham*, 1950 (1) S.A. 655 (T.) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or, to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice.”

In an application for leave to execute pending an appeal the court considers the following factors:

- (a) The preponderance of equities; that is to say the potentiality of irreparable harm and prejudice to the applicant if leave to execute is granted, or the potentiality of

irreparable harm and prejudice to the respondent on appeal if leave to execute is refused;

- (b) The prospects of success of the appeal, whether the appeal is frivolous or vexatious or has been noted not with the genuine intention of correcting a perceived wrong but merely in order to buy time;
- (c) If the competing interests are equal, then the balance of hardship to either party;

see *Zaduck v Zaduck (2)* 1965 RLR 635 (GD); 1966 (1) SA 550 (SR); *Graham v Graham (supra)*; *South Cape Corporation v Engineering Management Services (supra)*; *Fox & Carney (Pvt) Ltd v Carthew – Gabriel (2)* 1977 (4) SA 970 (R); *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H); *ZDECO (Pvt) Ltd v Commercial Carriers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H); *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd (supra)*;

I now turn to consider each of the above requirements in relation to the facts of this matter.

(i) PREPONDERANCE OF THE EQUITIES

The applicant's position was that the first respondent had both the money and the property. It said it was neither unable to develop the property nor to utilize it for raising mortgage finance because it was still registered in the first respondent's name.

On the other hand the first respondent argued that it would complicate matters if in the meantime the property was to be transferred to the applicant. The applicant would in all probability mortgage the property but only to have the situation unscrambled again should the appeal succeed. The first respondent put it this way in its heads of argument:

“Prejudice will be occasioned on the part of Respondent (appellant) if leave to execute is granted because if an innocent third party acquires the property or developments are effected on the property then this will complicate the whole case.”

The first respondent also submitted that ever since the disputed transaction it had refrained from transferring or selling the property to any other person or to encumber it in any way and he undertook to keep the situation like that until the appeal was determined.

Whilst the applicant was able to explain prejudice to itself directly if execution was not granted and the status quo remained, first respondent's concern was only in respect of potential third parties to whom the property might potentially be sold or mortgaged by the applicant should it get transfer whilst the appeal was pending. On this score I consider that a

preponderance of the equities favour the applicant. However, I cannot identify such harm to either party as would be irreparable should execution pending appeal be granted or refused.

(ii) THE PROSPECTS OF SUCCESS ON APPEAL

Mr *Hove*, for first respondent, argued strenuously that the fact that the Supreme Court had granted first respondent's application for condonation in which it necessarily had to deal with its prospects of success, must mean that the superior court had been satisfied with the merits of the appeal. However, I have considered it quite unsafe to rely on this argument. There was nothing placed before me to show what material had been placed before the Supreme Court for the condonation application. The Supreme Court judgment, if any, was not produced either. It would be presumptuous to hold as fact that the Supreme Court was satisfied that the appeal had prospects of success.

I have carefully analysed the judgment of BERE J which the first respondent has appealed against. In ground no 2 of its notice of appeal the first respondent refers to a breach of the agreement by the applicant. However, I consider that such a breach, if indeed there was, would have had no bearing on the outcome of the case. The breach would have been an immaterial factor. Whatever initial agreement there had been between the parties it had undoubtedly been novated subsequently. A new agreement had come into being. The applicant had paid the purchase price in terms of the new agreement. The first respondent's own lawyers, evidently upon instructions from the first respondent itself, and evidently upon being satisfied of the payments by the applicant, had not only tendered transfer of the property to the applicant and had not only raised a pro forma invoice for the transfer fees, but had also gone to actually receipt the payment. That was the most telling piece of evidence which was common cause and which tilted the scales of probabilities heavily in favour of the applicant. I do not see the appeal court upsetting this finding.

First respondent's third ground of appeal is also without merit. From the analysis of the evidence by the trial judge the conclusion could not have been anything other than that there had been a valid agreement between the parties that had been successfully consummated. It was manifestly an afterthought that the first respondent was trying to shift the goal posts on the question of interest. It is quite evident that the first respondent had wanted to pass onto the applicant the whopping rate of interest of 600% which it was allegedly being charged by its own bank but in an unrelated transaction. It was undoubtedly the applicant's refusal to accept this rate of interest, well after it had paid the purchase price

in full, that the first respondent had then turned around and had refused to pass transfer, alleging, a breach of the agreement by the applicant. Again I do not see the appeal court upsetting the trial judge's findings on this aspect.

First respondent's fourth ground of appeal, namely that the court had failed to consider that the agreement of sale had not been sanctioned by the boards of directors of both parties, is frivolous and, in my view, opportunistic. If the aspect of the board resolutions had been identified as one of the issues for trial it surely would have been listed in the joint pre-trial conference minute. Almost at the beginning of his judgment BERE J mentioned that the matter had been referred to trial at the pre-trial conference held before KUDYA J and that there had been only four issues for trial. Those had been listed as follows:

- (1) Whether or not there had been a valid and binding agreement of sale between the parties,
- (2) If there had been a valid agreement of sale, had the plaintiff breached the agreement of sale such as to enable the defendant to cancel?
- (3) Was the plaintiff entitled to take transfer of the property into their name?
- (4) What order as to costs was just and equitable?

The trial court could not concern itself with an issue which had not been referred to trial, if at all it had been raised as an issue.

At the hearing Mr *Hove* submitted from the bar that before filing the notice of appeal he had perused the record of proceedings and had noted that the aspect of the board resolutions had been an issue for trial. However, when I queried why such evidence had not been placed before me in this application, no plausible explanation was given.

I am satisfied that the appeal has no prospects of success. I see no justification for the applicant to wait for the determination of the appeal before it can enjoy the fruits of its success in the trial court. In the premises the application for execution pending appeal is hereby granted with costs. I make the following order:

- (a) Execution of the judgement obtained in this court in HC1140/07 on 6 February 2012 is hereby granted pending the determination of the appeal to the Supreme Court in SC67/12.
- (b) The respondents are hereby ordered to effect transfer of ownership of Stand 4 of Subdivision B of Prospect to the applicant and the first respondent is hereby ordered and directed to sign, or cause to be signed, all the necessary transfer documents within

fourteen (14) days of the date of this order failing which the Sheriff for Zimbabwe, or his lawful deputy, shall be authorised and empowered to sign any such documents.

(c) The costs of this application shall be paid by the first respondent.

C Kuhuni Attorneys, legal practitioners for applicant

TK Hove & Partners, legal practitioners for first respondent