

BRIGHTON NZARA
versus
CALISTO TSANYAU & OTHERS
and
DEPUTY SHERIFF, CHIVHU

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 June 2014

Urgent Chamber Application

W. Bherebende, for the applicant
Ms S. Nyathi, for the 1st respondent
2nd respondent in default

MATHONSI J: The applicant seeks an order for stay of execution of a judgment granted by the Magistrates Court sitting at Mvuma in Case Number GL 16/13 pending the hearing and determination of a review application he has launched in this court in HC 4191/14 wherein he protests that the magistrate's decision to allow the first respondent to execute pending appeal is reviewable by reason of procedural irregularities and bias.

The applicant is the chairperson of a co-operative comprising of 4 members namely himself, Calisto Tsanyau, Simpson Mangwanda and Tafirenyika Dzvarai which was engaged in the business of fattening cattle for sale. He was sued by the other members of the co-operative for delivery of 5 head of cattle or their value of \$5 375-00 in the magistrates court of Mvuma. He contested the claim and says that during the trial the magistrate denied him an opportunity to call a witness because "she had too many cases to handle" after which the matter was decided against him.

The applicant noted an appeal to this court against the decision of the magistrates court but not to be outdone, the first respondent made an application for leave to executive pending appeal. The magistrate granted leave on 8 May 2014. Unhappy with that outcome, especially cognisant of the procedural improprieties which occurred during the trial and what

he deemed to be the bias of the magistrate against him, the applicant brought an application for review in the court.

Unperturbed and determined to reach the land of milk and honey, the first respondent has issued a writ of execution against the applicant's property and instructed the messenger of court to proceed against the applicant's property. Sensing danger and impoverishment, the applicant has now approached this court for a stay of execution aforesaid.

It is not clear what the trial magistrate considered when she granted leave to executive pending appeal. What the court has regards to in determining such an application was summarised by MAKARAU JP (as she then was) in *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho* HH 39/07 (unreported) as:

“The position as stated in the decided cases then appears to me to be as follows:

1. An appellant has an absolute right to appeal and to test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible.
3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal vesting in the appellant.
4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
5. Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.
6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospect of success on appeal especially where the whole object of the appeal is defeated if execution were to proceed. (See *Wood N.O. v Edwards & Anor* 1966 RLR 335).”

See also *Dabengwa & Anor v Minister of Home Affairs* 1982 (1) ZLR 223 (H) at 225; *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 155; *Marume v Gwarada & Ors* HH 92/13.

The applicant has raised very pertinent issues concerning the conduct of the trial which require interrogation. He has also questioned how he could be ordered to pay to the first respondent the whole amount, when he was also a member of the co-operative entitled to a share of the proceeds from the sale of the cattle. In my view it cannot be said that his appeal is frivolous or vexatious. Nor that he has launched the appeal to harass the first respondent.

Now that an application challenging the propriety of the decision granting leave to appeal has been made, it cannot be said that such application does not deserve consideration especially against the background of an appeal that appears to deserve its day in court. The applicant has an absolute right of appeal and I am not satisfied that the trial magistrate properly exercised her discretion in effectively denying him the right of appeal by authorising execution.

Ms *Nyathi* for the first respondent submitted that the matter is not urgent at all, this being self- created urgency because the applicant delayed in approaching this court by about 18 days. To my mind that argument is not sustainable at all because there was no inordinate delay in the approach to the court. I, therefore, dismiss that argument.

On the merits of the matter, Ms *Nyathi* did not advance any basis for denying the applicant his absolute right of appeal, content to say that the trial magistrate was correct in arriving at that decision because the other members of the co-operative had been prejudiced.

Considering that an interim order for a stay of execution presents the applicant with a window period to pursue a remedy available to him in this court, I am of the view that he should be allowed that opportunity. It has not been shown that the balance of convenience favours the first respondent. Neither has it been suggested that all the considerations set out in the authorities on applications for leave were indeed taken into account given that the magistrate only gave an order with no reasons.

In the circumstances, I am satisfied that the applicant has made out a case for the relief sought. Accordingly, I grant the provisional order in terms of the amended draft order.

Bherebende Law Chambers, Applicant's Legal Practitioners
Coglan, Welsh & Guest, 1st Respondent's Legal Practitioners