GODWIN HLAHLA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 15 February and 27 March 2017

Criminal Appeal

T. Tazvitya, for appellant
F. I. Nyahunzvi, for respondent

MUSAKWA J: The appellant was convicted of contravening s 182 (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 4 months' imprisonment which was wholly suspended on condition that he complied with the order that was granted against him in 2012. He noted an appeal against conviction.

The background facts are that sometime in 2012 and at Chipinge Magistrates Court, Piko Hlahla filed an application for an interdict as well as for an order for the appellant's eviction from Farm 52 Sabi Zamuchiya. The appellant had lived at the farm since his birth. His father had also lived at the farm by virtue of a life usufruct that was granted in his favour by the High Court in 1987. On 17 July 2012 the appellant was ordered to vacate Farm 52 Sabi Zamuchiya within 48 hours.

The appellant noted appeal against the eviction order on 16 August 2012. On the other hand the complainant, Piko Hlahla sought leave to execute pending the appeal but this was dismissed on 25 September 2016.

The appellant was subsequently arraigned on a charge of contravening s 182 (2) of the Criminal Law (Codification and Reform) Act whereupon following a contested trial, he was convicted. In convicting the appellant, the court *a quo* reasoned that he should have applied for stay of execution pending appeal against the order of the civil court. It relied on the case of *Ritenote Printers (Pvt) Ltd* v *Anderson and Co and Another* SC 15/11.

There are five grounds of appeal in the notice of appeal. The first ground of appeal is that the trial court erred in holding that the appellant should have complied with the order under circumstances where another court had denied leave to execute pending appeal. The

other grounds advanced are a rehash of the first ground. I therefore need not state the rest of the grounds.

The issue before us centres on the interpretation of s 40 (3) of the Magistrates Court Act [*Chapter 7:10*] which states that-

> "Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

Mr *Tazvitya* submitted that a dismissal of the application for leave to execute pending appeal meant that the decision of the lower court had been suspended. As such the appellant had no obligation to obey an order that had been suspended. Therefore it was wrong for the trial court to hold that the appellant was obliged to apply for suspension of the order. It was superfluous to have expected the appellant to apply for stay of execution. He also submitted that as observed by CHIDYAUSIKU CJ (as he then was) in *Ritenote Printers (Pvt) Ltd v Anderson and Co and Another supra*, the law on the issue is not very clear. The import of this submission is that the lack of clarity in the law should be resolved in favour of the appellant. He further submitted that s 182 (e) requires proof of intention. It was not proved that the appellant intended to wilfully commit the crime.

Despite the State filing a concession in terms of s 35 of the High Court Act [*Chapter 7:06*], we were of the view that the concession was not properly made. Mr *Nyahunzvi* submitted that the state's concession was informed by the fact that both the appellant and Piko Hlahla were in attendance when the application for leave to execute pending appeal was determined. As such, the court *a quo* impliedly granted the appellant stay of execution when it dismissed the application for leave to appeal. He was of the view that if the application for leave to execute had not been made then the appellant would have been in contempt of court.

The case of *Ritenote Printers (Pvt) Ltd* v *Anderson and Co and Another supra* started in the Magistrates Court. Having been ordered to vacate the premises it was renting, the appellant in that case noted an appeal to the High Court. It also applied for stay of execution pending appeal, which application was dismissed by the Magistrates Court. The basis for dismissing the application for stay of execution was that the noting of appeal had the effect of suspending the order of the court. This was erroneous as was subsequently held by CHIDYAUSIKU CJ. The dismissal of Ritenote Printers (Pvt) Ltd's application for stay of execution prompted Anderson and Co to instruct the messenger of court to proceed with executing the order, notwithstanding that there had been no application for leave to execute.

In the High Court Ritenote Printers (Pvt) Ltd sought an order barring the sale in execution of its attached property as well as an order restoring it onto the vacated premises pending appeal. In dismissing the application in HH-263-10 GOWORA J (as she then was) held thus at p 6 of the judgment-

> "The order of the court a quo dismissing the application for a stay is still extant and in my view this court cannot be seen to be giving an order differing from that order whilst it is still extant. This would result in two orders from two different courts which would be in conflict of each other. Which order would then be binding upon the parties. To do so would constitute a clear departure from rules of procedure and an open invitation to litigants to treat the orders of court with contempt, because that is what my order would constitute."

When the same matter came before the Supreme Court, CHIDYAUSIKU CJ noted that the Magistrates Court had erred in holding that its decision was suspended by the noting of appeal. If the respondent was desirous of executing, it should have applied for leave in terms of s 40 (3). Instead, the respondent simply instructed the messenger of court to execute without having applied for leave to execute. At p 4 the Chief Justice went on to remark as follows-

> "In my view, the wording of s 40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of an appeal**. It follows therefore that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such an application the magistrate exercises the judicial discretion and makes a proper determination."** (My own emphasis)

CHIDYAUSIKU CJ went on to hold that the respondent in *Ritenote Printers (Pvt) Ltd* v *Anderson and Co and Another supra* could not proceed to execute without having sought leave before the magistrate. He further reasoned thus at p 6-

> "The learned Judge further reasoned that because the noting of the appeal did not suspend the learned magistrate's judgment, Adam & Co were entitled to execute that judgment. In my view, this is where the learned Judge erred. Firstly, the ruling of the magistrate that her judgment had been suspended by the noting of the appeal, though erroneous, was extant. While that judgment was extant Adam & Co could not act in contravention of it. The learned Judge did not set aside the magistrate's ruling. There was no appeal against that ruling. The application before the learned Judge was simply to set aside the eviction and attachment orders. The parties simply ignored it."

What comes out of the above except is that a judgment that is extant remains binding unless it is suspended or overturned on appeal. Even if the judgment is erroneously made, it remains valid and has to be complied with.

Coming to the present matter, it is not in dispute that there are two extant orders. The first is the order for the appellant's eviction. The second is the order denying Piko Hlahla leave to execute pending appeal. It is immaterial that Piko Hlahla had his application for leave to execute dismissed by the lower court. The appellant could not seek to profit from that development without moving the same court to exercise its discretion in his favour. This is because the order for his eviction was extant. That order required to be complied with regardless of the lower court's refusal to grant Piko Hlahla leave to execute. In light of two extant orders, it is not up to a party to choose to prefer one order whilst ignoring the other order. It is axiomatic that unless set aside or suspended, a court order must be complied with. Court orders are always expected to be specific and should not be implied.

In the result, the appeal is hereby dismissed.

C HATUKUTA J agrees ……

Bere Brothers legal practitioners, for the appellant
National Prosecuting Authority, legal practitioners for the state