ENGEN PETROLEUM [PVT] LTD
versus
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 24 April 2017 & 3 May 2017

Opposed application

Adv. R.M. Fitches, for the applicant
Mr A. Moyo, with him, Mr N. Mugandiwa, for the respondent

MAFUSIRE J: This was an application for leave to execute pending appeal. The background was this. In April 2011 the applicant sued a company called Wedzera Petroleum [Private] Limited, as the principal debtor, jointly with the respondent, as guarantor, for payment of an amount in the sum of $847 847-65, plus interest and costs. The claim arose out of petroleum products sold and delivered by the applicant to the principal debtor in 2010.

Both the principal debtor and the respondent contested the claim, but on different premises. At the trial, the principal debtor was in default. At applicant's instance, I entered a default judgment. Its defence was patently bogus anyway.

On 15 April 2016, following a fiercely contested trial, I entered judgment for the plaintiff, against the respondent, in the amount claimed. Five days later, the respondent appealed. Four months after the respondent's appeal, the applicant brought this application. Its major basis was that the appeal was a ploy to buy time and stave off the day of payment as it had no prospects of success.

The respondent vigorously opposed the application. Among other things, it cited the delay of four months, and claimed the application was an afterthought. Pointing to some

perceived misdirection in my judgment, the respondent maintained its appeal had bright prospects of success. It was argued the applicant would suffer no prejudice if leave was refused, given that it had waited since 2010. It could wait some more. The appeal was set to be determined shortly.

At the time of the respondent's notice of opposition, the record of appeal had since been prepared. The parties had since been called upon by the Registrar of the Supreme Court to file heads of argument.

In the present application, the applicant filed its answering affidavit and heads of argument some six months after the respondent's notice of opposition. It was explained the delay was occasioned by the fact that the applicant's principal attorneys were based in South Africa; that instructions had to be received and conveyed at every material stage of development, and that there had been a delay in the settlement of counsel's fees for the trial.

At the hearing, the parties advised that the Supreme Court had since set down the appeal for hearing on 23 May 2017. That was exactly a month away. For that reason, the respondent pressed for the removal of the application from the roll to avoid inconveniencing not only the parties, but also the two courts as well.

Mr Fitches, for the applicant, said he had no instructions to do otherwise than press on with the application. He argued, inter alia, that given the general trend at the Supreme Court where many a notice of appeal are dismissed for failure to scrupulously adhere to the procedural requirements, there was no guarantee that the respondent's notice and grounds of appeal would withstand stringent scrutiny. The appeal might not be heard on the merits.

Furthermore, *Mr Fitches'* argument continued, even if the appeal was heard on the merits, it was more than likely that judgment would be reserved for months on end. As such, the balance of convenience favoured that the application for leave to execute pending appeal be proceeded with and be determined because the applicant had been kept out of its money since 2010.

Mr Moyo, for the respondent, countered by saying *Mr Fitches'* argument was mere conjecture. It was not unusual for the Supreme Court to deliver an order and/or its judgment ex tempore.

There was further argument on the merits and demerits of the application for leave to execute pending appeal. I reserved judgment. This now is my judgment.

An application for leave to execute pending appeal is necessitated by the fact that an appeal automatically suspends the execution of the judgment or decision appealed against: see *Chematron Products [Pvt] Ltd* v *Tenda Transport [Pvt] Ltd & Anor* 2013 [2] ZLR 365 [H]. This is a common-law rule of practice. Its rationale is to prevent an irreparable damage being caused to an appellant.

But, in my view, an irreparable damage can equally be caused to the successful party by the noting of the appeal and the concomitant automatic stay of execution. Among other things, he cannot immediately enjoy the fruits of his success in the court of first instance. The rule has received some criticism and has prompted calls for its reversal: see *Econet [Pvt] Ltd* v *Telecel Zimbabwe [Pvt] Ltd 1998* [1] ZLR 149 [H], and *Chemafron Products* [supra].

The application for leave to execute pending appeal is premised on the principle that the court has an inherent power to control its own process. Thus, in the exercise of its wide discretion, it can order a stay of execution of its judgment. But it can also direct that the judgment be carried into execution. The overriding principle is real and substantial justice: see *Santam Insurance Company Limited* v *Paget* [2] 1981 ZLR 132, at pp 134 — 135.

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

1 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;

2 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;

3 If the competing interests are equal, then the balance of hardship to either party;

see Zaduck v *Zaduck* [2] 1965 RLR 635 EGD]; 1966 [1] SA 550 [SR]; *Graham* v *Graham* 1950 [l] SA 655 [T*]; South Cape Corporation* v *Engineering Management Services* 1977 [3] SA 534 *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* 1998 [1] ZLR 149*[H]*;

But I should add that the balance of convenience to both the parties and the courts should also be an important consideration in an application of this nature.

Each case depends on its own facts. Some factors may assume greater or lesser importance in some cases than do others in other cases. In my view, a decision either way will inevitably prejudice the losing party. It may just be the degree of prejudice that may be comparatively different. Invariably, the decision whether or not to grant the application turns on the relative strength or weakness of the appeal.

In this case, much energy was expended in weighing the respondent's prospects of success on appeal. That necessarily entailed ploughing substantially the same field as done at the trial.

However, given that the appeal is set to be argued only in a month's time, I have considered it more prudent and more expedient and more practical to allow the appeal to be heard without upsetting the status quo. This will avoid a potentially embarrassing situation where, for example, being satisfied that the respondent's appeal is unmeritorious and therefore doomed to fail, I could grant the leave to execute, only for my judgment in the trial to be overturned in a month's time.

One of *Mr Fitches'* arguments was that even after the Supreme Court has heard the appeal, it might well reserve judgment for months on end, resulting in the applicant continuing to suffer prejudice in spite of its success at the trial. But there are two answers to this. This was mere speculation. The Supreme Court could well pronounce its ruling ex tempore. Furthermore, an application for leave to execute pending appeal is concerned with the interim period between the noting of the appeal and the hearing of it. The application is largely informed by the inordinate delays that are often associated with

getting an appeal heard. As *Mr Moyo* argued, once the appeal is set down and heard, it is now the Supreme
Court, not this court, that is seized with the matter. Otherwise, the logical extension of *Mr Fitches'* argument would be that an application of this nature could be mounted even after the Supreme Court has heard the appeal for as long as its judgment remains outstanding. I do not think that this can be done.

Thus, in my view, the balance of convenience decides this matter. As such, there is no need to consider the other requirements for leave to execute pending appeal.

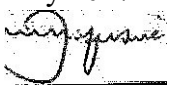
Although in their papers both parties sought the costs of this application, at the hearing none of them persisted. However, none of them expressly abandoned them either. *Mr Moyo* merely prayed for the withdrawal of the application. *Mr Fitches* said he had no instructions to do otherwise than press on with it.

The general rule is that costs follow the event. The loser pays the winner's costs. However, it is also the rule that costs are entirely in the court's discretion. The discretion is exercised judiciously and not whimsically: see *Graham* v *Odendaal* 1972 [2] SA 611 [AD]; and *Kruger Brothers & Wassermen* v *Ruskin* 1918 AD 63, at p 65 - 67.

Given that the disposal of this matter has hinged on what is largely a neutral factor which was not the bulwark of the argument by either side, namely the imminent hearing of the appeal, I consider it fair and reasonable to order that each party should bear their own costs.

In the premises the matter is removed from the roll with each party to bear their own costs.

3 May 2017



Wintertons, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners