

ARJUN INVESTMENTS (PVT) LTD

Versus

THOMAS MUTAMBIRWA

And

FLORENCE VENTER

And

SARAH NDLOVU

And

TENDAI CHIEZA

And

NOMALANGA SIBANDA

And

SIBUSISIWE NCUBE

And

SHIRLEY MANDINDO

And

WEBSTER AND VINCENT

And

BENNY NCUBE

And

SOFT-TOUCH ELECTRONICS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 18 OCTOBER 2011 & 16 FEBRUARY 2012

Advocate P. Dube for applicant
Miss C R Mudenda for respondent

Urgent Chamber Application

NDOU J: The application has a chequered history as evinced by the several cross-reference matters. The parties have been locked in a stand-off since November 2010 and in litigation since March 2011. Several applications have been filed by the respondents, the history whereof can be gleaned from the records of the cases cited as cross-references in this matter.

I propose to give a summary of these matters. At the time of filing this application, the following crucial procedural developments had occurred in the litigation history of the matter. On 14 March 2011 the parties appeared in chambers before CHEDA J to argue the granting or refusal of the provisional order in case number HC 379/11. The respondents were represented by *G Nyoni*, who had to be excused from appearing, as he was not properly before the court. Upon hearing the respondents as self-actors, representations and submissions being made by the 1st respondent, the Judge issued the provisional order in the terms asked.

On 11 April 2011 an appeal was lodged, without leave against the granting of the provisional order in HC 379/11. The appeal was number SC 76/11. On 13 May 2011, a provisional order was granted ex parte in case number HC 1276/11 at the instance of the respondents, suspending the effects and operations of the provisional order in HC 379/11 pending finalization of that case. On 16 June 2011, CHEDA J issued full reasons for the granting of the provisional order in HC 379/11. On 7 July 2011 the provisional order in case number HC 379/11 was confirmed in open court. On 25 July 2011 an order granting leave to appeal against the provisional order was granted by KAMOCHA J in chambers. This order was granted before the present applicant was served the application. The order was apparently granted in the wrong record. This application was served on the present applicant on 4 August 2011 and the application was opposed. The respondents thereafter filed answering papers in August 2011. Both parties were unaware that there had been an order granted ex parte by KAMOCHA J. On 29 August 2011 the Registrar of the Supreme Court declared that the appeal under SC76/11 had lapsed.

On 1 September or about that date, the present applicants attempted to execute the confirmed order in case number HC 379/11. That eviction was halted by the Assistant Registrar of this court on representations made to him by the respondents' legal practitioners unilaterally. On 7 September 2011, the present respondents filed an application for stay of execution of the final order in case number HC 379/11 pending the outcome of the lapsed appeal in SC 76/11. The application was argued on 12 September 2011. On 22 September 2011 that latter application for stay of execution was dismissed. After the dismissal, the present applicant attempted another eviction of the respondents. This attempt was again halted on the grounds that there was an appeal pending. The appeal was noted under case number SC226/11. This was an appeal against the judgment of this court refusing stay of execution. In the main, the applicant takes the view that there is no valid appeal pending before the Supreme Court such as would justify the grant of stay of execution.

In the alternative, the applicant seeks an order permitting it to execute the final order pending the outcome of the appeal in SC 226/11. The problem with the main argument is that the applicant wants me to determine the validity of notice of appeal filed by the respondents under SC 226/11. That is the effect of the main order sought. The validity of such notice of appeal is the province of the Supreme Court. I cannot pronounce on whether the appeal was validly filed or not. I will now consider the alternative relief sought i.e. order permitting execution pending appeal. It is trite law that the factors to be considered in such an application are the following. "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 (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 (applicant in the application) if leave to execute were to be refused.
- 3) The prospects of success on appeal, including more particularly the question as to 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 *e.g.* 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" – per CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534(A) at 545D-F. This view has been cited and followed in our jurisdiction – *Dabengwa & Anor v Minister of Home Affairs & Ors* 1982(1) ZLR 223(H); *Van T'Hoff v Van T'Hoff & Ors* 1988(1) ZLR 335 (H); *Zimbabwe Distance Correspondence Education*

College (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd 1991(2) ZLR 61 (H) and
Masukume v Mbona & Anor 2003 (1) ZLR 412 (H) at 414-415.

In casu, there is potentially irreparable harm to the applicant if leave to execute pending appeal is not granted. The applicant has realized no return at all since its purchase of the property subject-matter of these proceedings. The respondents have declined to pay rentals or operating costs. The applicant continues to suffer delay in the realization of its plans for the renovation of the property and use for the applicant's business purposes. The appeal in SC 226/11 has been lodged to cause delays and to prolong the respondents' occupation of the applicant's property. It has been lodged to cause maximum harassment to the applicant as evinced by the violent confrontation its directors have been subjected to. The applicant's directors have been subjected to racist threats, death threats and abusive telephone calls. The history of the respondents' behaviour is consistent with dilatoriness and lack of *bona fides*. The respondents have done everything, filed every conceivable application they think of. They have gone to all offices they could go in their bid to defeat the applicant's rights emanating from orders of this court. Their actions have been aimed at prolonging the occupation of the applicant's property without paying anything. There is clearly no intention to test the correctness of the judgment of this court on appeal, but rather, an intention is displayed to challenge correctness of some statements made by the court and to seek new relief that was not in issue in this court. The respondents are unlikely to suffer any irreparable harm if the order is granted as they can sue for damages. In any event they occupy the premises free of charge.

Accordingly, the application is granted in terms of the amended provisional order in pages 31-33 of these papers.

Webb, Low & Barry, applicant's legal practitioners
Mudenda Attorney, respondent's legal practitioners