

HB 101-18
HC 723/18
XREF HC 736/17
XREF HC 3276/17

BOTTOM ARMATURE WINDING (PVT) LTD
versus
CLEMINSON AND PLASKITT (PVT) LTD
and
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 15 MARCH 2018 AND 12 APRIL 2018

Urgent Chamber Application

S Chamunorwa for the applicant
Mrs M Moyo-Masiye for the 1st respondent

MOYO J: The applicant in this matter filed an application seeking an interim order as follows:

“Pending the final determination of this matter, the applicant is granted the following relief:

- (1) The respondents be and are hereby interdicted from executing on the warrants of execution and ejection issued in case number HC 763/17
- (2) In the event that execution has commenced, the 2nd respondent be and is hereby ordered to release the applicant’s property from attachment and then cease the eviction of the applicant from the premises known as number 6 Cowden Road, Steeldale Bulawayo.”

The applicant in its founding affidavit paragraph 4, states that this is an application for an order confirming that the judgment of this Honourable court granted on 22 February 2018 was suspended by the noting of the appeal in the Supreme Court under S/C 115/18 and further that the provisional order of 15 December 2017 in HC 3276/17 has the effect of staying executive of the judgment of this court of 9 November 2017. Respondents opposes that order and says applicant cannot be entitled to that order as once discharged a provisional order lapses despite an appeal and can therefore not be so reviewed.

There is only one issue for determination therefore before this court and that is, whether the applicant has made a case for the relief sought.

The background of this matter is that applicant and first respondent are lessee and lessor respectively. Applicant fell into arrears on the rentals due as per the lease agreement. First respondent sued applicant for arrear rentals and the ejectment of applicant from the premises rented. Midway through those court proceedings, applicant and first respondent drew a deed of settlement wherein they agreed on the terms of payment of the arrears and what would happen if applicant breached the lease agreement. The deed of settlement was accordingly reduced to a court order. According to first respondent applicant breached the terms of the deed of settlement. According to applicant, the terms of the deed of settlement were adhered to. A provisional order had been granted preventing the first respondent from executing the court order pending the interpretation of the order, that is to say, pending a finding as to whether the court order was breached or not. At the finalization of the matter, the court discharged the provisional order as it was of the view that the court order had been breached. The applicant then appealed against the discharge of that order and the whole judgment relating to the whole matter on the interpretation of the court order.

A lot of arguments were brought forward by either party relating to whether an appeal suspends the discharge of a provisional order or not. Applicant's counsel says it does, first respondent's counsel thinks not.

My own view on whether the provisional order should be granted staying execution pending the Supreme Court challenge is that an appeal suspends the execution of an order pending its hearing. This legal principle in my view presupposes that a party has been successful, they have won a right, a right to execute and bring to fruition an order of court. It is the right, the success that the appeal suspends. In my view if says a plaintiff's case is dismissed, and the plaintiff notes an appeal against some, because no rights were obtained by the defendant then there is nothing to suspend on appeal. I hold the view that for something to be suspended on appeal, it must first exist, a court must grant a right, it would then follow that the exercise of that right is then suspended by an appeal.

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Where there is no right derived from a court order, like in the instance of a dismissal of a case, I believe an appeal does not then suspend anything as there is nothing to suspend. I tend for this reason to agree with the first respondent's counsel that, the appeal against the discharge of a provisional order does not give the applicant any rights that warrant a stay of execution of the court order that was previously granted. I also doubt if the Supreme Court can resuscitate a discharged provisional order. I hold the view that the Supreme Court may interpret the court order differently but I doubt if procedurally it is possible to reinstate a provisional order that was discharged by the High Court.

Even on the prospects of success on the interpretation of the court order itself, I hold the view that the court order seems to be clear as to its ordinary grammatical meaning such that the interpretation of the court that discharged the provisional order is likely not to be faltered.

It is for these reasons that I do not hold the view that applicant has made a good case for the relief sought.

First respondent's counsel submitted that the applicant should be made to pay costs at a higher scale in the event that the application is dismissed as he submitted the basis for this as the fact that a third party is claiming the property in applicant's premises in interpleader proceedings and yet applicant in this application says the property belongs to it and its attachment will cause it undue prejudice. I hold the view that this is not sufficient a basis for punitive costs as we do not know why the third party is claiming those assets in the manner they are doing. It has not been shown that applicant is conniving with the third party in those interpleader proceedings therefore it will not be appropriate to make that assumption with the result that applicant then gets penalized on costs.

I will accordingly for the reasons stated herein dismiss the application with costs.

Calderwood Bryce Hendrie and Partners, applicant's legal practitioners
Masiye-Moyo and Associates, 1st respondent's legal practitioners