UPSET INVESTMENTS (PRIVATE) LIMITED
versus
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 16 November 2015 & 9 December 2015

Opposed Matter

S. Kachere, for the applicant
P. Chingwena, for the respondent

MUNANGATI-MANONGWA J: This is an opposed application in which the applicant seeks to execute on an order granted in its favour. The respondent having appealed the order granted is opposed to the execution pending the hearing of its appeal. The present applicant, the plaintiff in case No. HC 7649/14, sued the respondent then the defendant for payment of the sum of US$46 332-00 being money owed by the defendant to the plaintiff for hiring out its heavy duty equipment and machinery. The plaintiff also sought interest and costs on a higher scale.

The defendant contested the sum of US$46 332-00 but in its pleadings admitted to owing US $37 619-50. At a pre-trial conference hearing held on 4 March 2015 before Bere J, in the presence of the defendant, the latter being duly represented by Mr *T Marume* obtained a judgment in the sum of the US$37 619-50 the admitted amount. The balance of the claim and costs were referred for trial. The applicant submits that the order came as a result of consent by the parties although the order does not specifically state so. It is this order that the applicant seeks to execute upon.

The defendant had on the 17 March 2015 appealed to the Supreme Court against the judgment of Bere J granted at the Pre-Trial Conference on the pretext that the court had erred at law in granting a judgment without the consent of the parties or striking of the appellant's defence.

A further ground was that the court should have given due consideration to an application for consolidation under case number HC 1521/15 which was pending in the High Court hence the resultant judgment in that application would be purely academic. Apparently in case number HC 1521/15 the respondent in this matter sought to consolidate this matter HC 6245/14 and the matter under HC 7649/14. In the former case, the present applicant had sued respondent for payment of US$119 300-00 being the balance of purchase price of an Excavator supplied to the respondent. The respondent pleaded to the claim and counter claimed for specific performance or alternatively US$140 000-00. This matter is still before the court. In essence the matter with the judgment in issue being case No. HC 7649/14 progressed faster leading to the pre-trial conference.

It is common cause that at the pre-trial conference the respondent sought a postponement to enable the application for consolidation of matters to be heard as it expected a set – off in the end. On 25 March 2015 the plaintiff's legal practitioners had written to the defendant's legal practitioners intimating that the purported appeal filed with the Supreme Court on 17 March 2015 was "not appealable against since it was granted by consent" and hence they were to proceed to execute. Suffice to say the plaintiff then filed the application for execution pending appeal which is now before the court, which application is opposed.

In terms of our common law, an appeal suspends the operation of a judgment and where the successful party seeks to proceed to execute upon the judgment leave of court has to be sought.

To grant or not to grant leave to execute pending appeal is discretionary. In the widely referred to case of *South Cape Corporation (Pvt) Ltd* v *Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A) at 545 D – F, Corbett JA succinctly enunciated the factors which the court has to have regard to in exercising its discretion. The learned Judge of appeal stated that, in exercising that discretion:

> "…… the court should ……. 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 where to be granted.
>
> 2. the potentiality of irreparable harm or prejudice being sustained by the respondent (applicant in the application) if leave to execute were to be refused.

3. The prospects of success an 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."

These principles have been restated with approval in numerous cases handled by this court among others *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152.

Lincoln Court (Pvt) Ltd v *Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd* 1990 (1) ZLR 158 HC

The applicant has averred that it is being put under unnecessary expense by the respondent's dilatory tactics when from the onset its liability is not in dispute. The applicant further averred that it is being prejudiced by failure to get payment as it has urgent financial needs which include payment of salaries to its workforce. In response thereto the respondent in addressing the issue of prejudice or irreparable harm stated in the affidavit filed on its behalf by George Makunde that:

"The respondent will suffer irreparable injury which cannot be remedied by an order of costs."

To my mind, a party seeking to convince a court regarding the hardship, harm or prejudice it may experience due to actions of the other party, has to establish more. It has to highlight to court what it is, in regard to the nature of the hardships or injury it will sustain and indeed the extent thereof. To simply make a bold statement will not assist either that party or convince the court to find otherwise.

I find it hard to conclude that the respondent will suffer irreparable harm or prejudice from the bold assertion by the respondent that, the granting of leave to execute will result in such. Consequently I cannot proceed to weigh the balance of hardship or convenience as between the parties having found that the respondent will not (from the facts) suffer any prejudice.

In considering the prospects of success on appeal the question of the *bona fides* of the noting of the appeal arises. The applicant has submitted in its heads of argument that the

respondent simply intends to harass or frustrate the applicant, which averment is denied by the respondent.

Whilst the respondent has raised issue that the order granted by Bere J was not by consent, and same is subject of appeal, of note are the following aspects:

The respondent was represented by a legal practitioner at the Pre – Trial Conference. Apart from a bold denial in averments from the respondents' Town Clerk who averred to the opposing affidavit, there is absolute silence from the legal practitioner Mr *T Marume* who attended the Pre – Trial Conference. The legal practitioner who attended the hearing could have shed light on how the judge came to give the order.

Consent orders can be granted in terms of common law apart from the provisions of r 54 as correctly pointed out by the applicant who referred to the following sentiments by Makarau J (as she then was) in *Margaret Masulani* v *Fannel Masulani* HH 68/03:

> "It is common cause that the consent judgment in the application before me was not granted in terms of the rules. The parties appeared before a judge in chambers and indicated the terms of the consent order to the judge orally. No formal document was signed and filed by the parties embodying the consent order. Technically, the consent order in the application before me was not granted in terms of the rules. It was granted at common law".
> (See Washaya and Washaya 1989 (2) ZLR 195 (H) at p 199F).

Without usurping the powers of the Supreme Court which will have to decide on the issue of the consent judgment, the very fact that Honourable Justice Bere only granted the admitted component of the debt being US$37 619-50 and referred the issues of the balance, and costs to trial, points to agreement between the parties.

Pertinent, is a clear admission by the respondent in its plea when faced with a claim for $46 332-00. It pleaded as follows:

> "Wherefore defendant prays that the order be for the US$37 619-50 admitted and costs be on an ordinary scale."

This constitutes not only an admission but a move for an order to be granted to that extent. To then seek to appeal against the endorsements of such an admission is, in my belief, not only an abuse of court process but a gross display of insincerity, and an attempt to frustrate and vex the applicant in its quest for satisfaction of judgment. As Makarau JA stated with the concurrence of Ziyambi JA and Garwe JA in *Mining Industry Pension Fund* v *Dab Marketing (Pvt) Ltd* S25/12 ZLR (2) p(s) 132 – 144 at p(s) 138 H – 139 A:

> "A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts…… The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted".

Thus with the admission of liability which was clear and unambiguous the court did right when it granted the order.

In considering the other ground of opposition by the respondent, that it has good prospects of success on appeal as the court failed to give due consideration to the pending application of consolidation of this case and the other one (HC 6245/14) in which the applicant was suing the respondent for US$119 300-00 and the respondent was counter claiming the restitution of US$140 000-00 or specific performance, one but cannot avoid noting that, it was the respondents quest to then seek set-off when the two matters were to be heard.

The averment by the applicant that Bere J threw out the application for postponement *sine die* on the basis that the application for consolidation per se could not bar his Lordship from hearing the matter, was not controverted. Looking at the facts, whilst assessing the prospects of success on appeal, the respondents' claim in the matter in which consolidation was sought was for US$140 000-00 or specific performance against a claim by the applicant of US$119 300-00. A simple mathematical calculation will show that should either party be successful set-off can simply be effected irrespective of the order already in existence.

Whilst consolidation is a convenient way of bringing matters with the same parties having inter-related issues to be dealt with at once as conceded to by Mr *Chingwena*, the denial by Bere J to be held up by that application is in my view not fatal.

The respondent further raised the issue that there was no answering affidavit to its opposing affidavit hence there was/is an admission to the averments in the respondent's affidavit. I find this not to be fatal more so when some material averments by the respondents were bold averments as alluded to earlier.

In that regard, I find that the applicant has satisfied the court that the noting of an appeal by the respondent is a ploy to delay and deny the applicant timeous satisfaction of the judgment granted in its favour. The respondent had prayed for an order for costs on a higher scale. Due

regard being made to the facts of this matter, the Court finds that it is an appropriate case to grant an order of costs on a client- attorney scale. The court therefore orders as follows:

1. The applicant is hereby granted leave to execute the judgment granted in HC 7649/14
2. The respondent to pay applicant's costs on an Attorney –client scale.

Kachere & Guwuriro, applicant's legal practitioners
Matsikidze & Mucheche, respondent's legal practitioners