

ZEKIA MUJAHO
versus
TURNSTEAD INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 11 June 2019 & 12 June 2019

Opposed Application

H Muromba, for the applicant
A Mabvakure, for the respondent

ZHOU J: This is an application for leave to execute a judgment of this court which was granted in Case No. HC 8351/18 pending determination of the appeal noted against it. The judgment was granted on 16 January 2019. On 23 January 2019 the respondent filed a notice of appeal in the Supreme Court against the whole judgment. The appeal was filed under Case No. SC 19/19.

The instant application is opposed by the respondent.

The background facts upon which the judgment in Case No. HC 8351/18 was granted are as follows. The applicant is the registered owner of an immovable property known as “certain piece of land situate in the District of Salisbury, being Stand 1201 Greendale Township of Lot 4288 Greendale measuring 4503 square metres, held under Deed of Transfer No. 3945/2018. The applicant acquired the property through a sale in execution which was conducted by the Sheriff. Having acquired title the applicant instituted proceedings to recover the property from the respondent which had failed to vacate same despite being given notice to do so. This court (*per* MUNANGATI-MANONGWA J) granted an order for the ejectment of the respondent and all persons claiming occupation through it from the property and payment of holding over damages of US\$1600 *per* month from 1 August 2018 to the date when the applicant receives vacant

possession of the property. The respondent was also ordered to pay the applicant's costs on the attorney-client scale.

In considering an application for leave to execute pending appeal the court considers the prospects of success of the appeal and the preponderance of equities as between the parties, see *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) at 154; *Forester Estates (Pvt) Ltd v Vengesayi & Anor* HH 19-2010; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545. It is clear from a reading of the judgment in HC 8351/18 (Judgment No. HH 112-18) that the matter was disposed of on the basis of the principles applicable to the *actio rei vindicatio*. That is so because that was the applicant's cause of action. In order for the applicant to succeed he needed to establish the requirements of the *actio* which are that he is the owner of the property and that the respondent is in occupation of the property without his authority. This the applicant succeeded in doing. On the other hand, for the respondent to successfully contest the application it needed to allege and establish the recognized defences to an *actio rei vindicatio*. These defences were recited in the judgment (p 4 of the cyclostyled judgment). The court came to the conclusion that the respondent had failed to establish any of the legal defences.

The notice of appeal filed on behalf of the respondent does nothing to impeach the conclusions of the court. The matters raised in the notice of appeal do not constitute valid defences to the *actio rei vindicatio*. The first of the grounds of appeal was that the court erred in not dismissing the application pending determination of the respondent's application under HC 6787/18 to set aside the Sheriff's sale. It is common cause that that application has since been dismissed which renders the ground of appeal irrelevant. The second ground of appeal is that the court erred in dealing with the matter without "the title holder and owner of the property (Charles Mataure) being cited as a party to the proceedings and therefore denying him the chance to enforce his rights." This is a meritless ground for the simple reason that when the matter was heard the applicant, and not Charles Mataure, was (and remains) the owner of the property. Further, the said Charles Mataure is not the respondent in this matter and was not the respondent in Case No. HC 8351/18. After all, Charles Mataure is the one who actually appeared at the hearing to represent the respondent, and never claimed a right to be joined. Furthermore, the issue raised is not one of the recognised defences to the *actio rei vindicatio*. The issue pertaining

to cession of debts to Stroll Investments (Pvt) Ltd which is raised as the third ground of appeal is not a valid defence as well. From the above, I am convinced that the appeal has no prospects of success and is meant to harass the applicant.

The preponderance of equities favours the granting of leave to execute pending appeal. The applicant has title to the property. There is no reason why he should suffer the inconvenience of being out of a property for which he has paid the full purchase and which he has taken transfer of. The appeal by the respondent, even if it was to succeed, is not seeking the setting aside of the applicant's title to the property.

Instead, the respondent is seeking to be allowed to remain in occupation of a property which is registered in the name of the applicant, which is a negation of the right of ownership. Without the applicant's title to the property being set aside it is inconceivable how the respondent's appeal could succeed.

In the result, IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave to execute the judgment granted in Case No. HC 8361/18 notwithstanding the noting of an appeal against it.
2. The respondent shall pay the costs of this application.

Kantor & Immerman, applicant's legal practitioners
Samukange Hungwe Attorneys, respondent's legal practitioners