

TICHAONA MUDZINGWA  
And  
LILIAN GANJIRI  
And  
ELIZABETH SIBANDA  
And  
MUDYANAGO ZHOU

Versus

KIMBERWORTH INVESTMENTS (PVT) LTD  
t/a SABI GOLD MINE  
And  
E MATURA N.O

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO 27 JUNE & 5 JULY 2023

#### OPPOSED APPLICATION

All Applicants, in person  
Mr L Mudisi, for Respondents

ZISENGWE J: The applicants via this review application seek an order setting aside the decision of the Magistrates' court at Zvishavane, per MATURA Esquire (the 2<sup>nd</sup> respondent) granting an application for execution pending appeal. The execution being the eviction of the applicants from houses which they occupied at the time of the application by virtue of their employment with the 1<sup>st</sup> respondent.

The four applicants and the 1<sup>st</sup> respondent have had a fractious and tumultuous relationship in the wake of the termination of the former's employment by the latter. Although each of the four applicants initially brought individual review applications challenging the manner in which the 2<sup>nd</sup>

respondent arrived at her decision, it was soon agreed that their matters be consolidated and heard as one. The applicants also elected one of their number, namely Mr Tichaona Mudzingwa as their representative to argue the matter on their behalf.

Whether or not the applicants are still employed by the 1<sup>st</sup> respondent is bitterly contested as between them. Whereas the applicants insist they are, the Respondents contend contrariwise.

Be that as it may, it is common cause that sometime in 2018, the 1<sup>st</sup> respondent apparently terminated the applicants' contracts of employment. The applicants reacted by challenging such termination with the labour officer. The labour officer after going through the submissions of the parties concluded that the termination by the 1<sup>st</sup> respondent of the applicants' contracts of employment was not effectual and therefore that their contracts of employment were still extant. He further ruled that their benefits would continue to accrue until the contracts were properly terminated.

In the interim, however, the 1<sup>st</sup> respondent filed an application for the eviction of the applicants from the company houses which they occupied on account of their employment. Needless to say, the application was based on the *actio rei vindicatio*, it being averred that the applicants having lost their employment with the 1<sup>st</sup> respondent had accordingly forfeited any right to occupy the houses in question. Although the applicants resisted that application it was nonetheless granted prompting the applicants to file an appeal with the High Court against the same.

The applicants' position in the main has always been that they are still employed by the 1<sup>st</sup> respondent by virtue of the determination of the labour officer and that therefore that they have not relinquished any of the rights accruing from their respective employment contracts not least the occupation of the houses in question.

The granting of the application for the eviction of the applicants from the premises in question spawned two different but related offshoots. Firstly in 2019 the applicants appealed against that decision to the High Court. It appears that the noting of that the appeal forestalled the eviction of the applicants from the premises as they continued to occupy the same.

That appeal apparently went on to grow a life of its own, so to speak. This is because on 27 May 2021 in CIV "A" 96/19, the High Court sitting at Harare after hearing arguments on the

matter proceeded to strike it from the roll. The reason given being that the labour court should be the one dealing with the matter as it was effectively a labour dispute.

Dissatisfied with that outcome, the applicants proceeded to appeal against the same to the Supreme Court. On 13 May 2022, the Supreme Court under Civil Appeal number SC176 of 21 proceeded to give the following order:

**IT IS ORDERED BY CONSENT THAT:**

1. *In respect of all the 4 matters, the appeal is allowed.*
2. *The judgment of the court a quo is set aside.*
3. *The matters are remitted to the court a quo for it to determine whether the magistrates' court had jurisdiction to decide the matter and thereafter proceed accordingly.*
4. *Each party shall bear its own costs.*

As matters currently stand, that appeal is still pending before the High Court following the above order by the Supreme Court. It is this apparent delay in the resolution of the appeal that gave birth to the second offshoot namely the application by the 1<sup>st</sup> respondent for execution pending appeal. It is the latter application in which the origins of the present application are in turn located. This is because on 10 May 2023, the 2<sup>nd</sup> respondent delivered a judgment granting the application for such execution pending appeal. In assessing the question of prejudice and the balance of convenience among other relevant considerations, the learned Magistrate found that given the delay in the finalisation of the appeal and the applicants' continued use and occupation of the houses in question resulted in untenable prejudice to the 1<sup>st</sup> respondent as owner of the property. Ultimately therefore the court granted the application for execution pending appeal.

It is that ruling that this review application attacks. The hearing of the present application was not without incident as it was preceded by an urgent chamber application brought by the applicants for the stay of the order granting execution pending appeal.

At one point they were fighting their cause on four fronts, three of which (including the present are still alive). I only refer to these different suits to put matters into prospective. The first suit is their challenge against their dismissal. This particular matter was filed with the labour officer as aforesaid. That decision is yet to be confirmed by the labour court. At one point it was struck from the roll and is yet to be reinstated. The second is their appeal filed in the High Court in Harare against the order of their eviction from the 1<sup>st</sup> respondent's premises. The third is the

present application for the review of the decision of the Magistrates Court granting an application of execution pending appeal. The fourth and final was the still-born urgent chamber application to stay the order granting execution pending review' talk of being indefatigable!

As stated earlier the parties agreed to a consolidation of the latter two applications. Before reverting to merits of the present application it is necessary to briefly refer to the events surrounding the urgent chamber application. The urgent chamber application which was eventually consolidated with the present review application was preceded by one which was defective for want of compliance with the rules resulting in the same being struck off the roll (with the consent of the applicants). This development was not without consequence as will soon be demonstrated. No sooner had that first urgent chamber application been struck off the roll did the applicants file a fresh one - the latter which was then consolidated with this review application.

Reverting now to the review application, the following were cited by the applicants as their grounds of review:

1. *The 2<sup>nd</sup> Respondent's decision to grant the application for execution pending appeal was grossly irregular and illogical at law, to the extent that no court acting in the same capacity and on the same facts of and at law (sic) would have come up with such a decision. The court a quo committed gross irregularity by:*
  - 1.1 *Ignoring the facts that there is already a determination by the labour officer invalidating the purported termination which formed the basis of eviction.*
  - 1.2 *Abandoning the fact that the High Court already indicated that it had no jurisdiction to deal with the appeal as it is a labour matter.*
  - 1.3 *Misinterpreting the Supreme Court order which clearly instructed the High Court to determine whether Magistrate Court as a court of first instance had the jurisdiction to deal with a labour matter, nothing more nothing less.*
  - 1.4 *Granting the applicants when it failed to satisfy the prerequisites to warrant its granting at law, primarily the absence of termination of the contact.*
  - 1.5 *Misrepresenting facts, alleging that the parties agreed to proceed without filing new evidence, contrary to the directive by the 2<sup>nd</sup> respondent herself, on the 10<sup>th</sup> of March 2023, for parties to file supplementary evidence and the applicants agreed.*

*1.6 Ignoring uncontested supplementary evidence filed on record by the Applicants*

Accordingly, the applicants seek an order setting aside the decision of the Magistrates Court and substituting it with an order dismissing the application for execution pending appeal.

This application for the review of the decision of the Magistrates Court stands opposed by the 1<sup>st</sup> respondent the thrust of whose argument is that the decision of the Magistrates Court is unimpeachable as all the requirements for the granting of an application for execution pending appeal were comfortably satisfied.

Further the 1<sup>st</sup> respondent avers that the appeal has since been overtaken by events as the High Court rendered its determination which determination was appealed against (by applicants) to the Supreme court. Additionally, the 1<sup>st</sup> respondent argues that the ruling of the labour officer is merely a draft ruling until same has not been confirmed by the Labour Court. Reliance in this regard was placed on the case of *Netone Cellular v Reward Kangai* HH-90-22 where the following was said:

*“No right accrues to the defendant based on the labour officer’s ruling. No debtor – creditor relationship exists between the parties. As already stated the labour officer’s ruling does not give rise to an enforceable right. Even if my finding may be wrong, no lien arises from an employment contract.”*

The 1<sup>st</sup> respondent further refuted allegations that the applicants’ supplementary affidavits had been ignored by the 2<sup>nd</sup> respondent in arriving at its decision granting the application for execution pending appeal. The 1<sup>st</sup> respondent referred to excerpts from the Magistrate’s ruling where reference was made to the contents of the applicants’ supplementary affidavit implying that the supplementary affidavits were in fact taken into account.

The applicants raised one preliminary point which they believe is potentially dispositive of the matter in their favour and so did the 1<sup>st</sup> respondent. It is to these preliminary points that I now turn. The points in limine raised by the parties are inextricably intertwined as they both relate to the events which played out in the wake of the first urgent chamber application being struck off the roll. Earlier in this judgment I promised to refer to the events which transpired after that first urgent chamber application was struck off the roll and the significance thereof. I will now make good on that promise.

It was submitted on behalf of the 1<sup>st</sup> respondent that in the wake of the striking of the initial urgent application from the roll the applicants have since been ejected from the houses in question effectively delivering a *fait accompli* against them.

Although the 1<sup>st</sup> respondent did not avail the Messenger of Court's report in this regard, it is common cause that up until the hearing of the first urgent chamber application and its striking off the roll, the applicants remained in occupation of the houses in question. However, the moment that urgent chamber application was struck off the roll, the 1<sup>st</sup> respondent swiftly moved in and caused the applicants to be ejected from the houses in question upon a duly signed warrant of ejectment being obtained from the court.

It was submitted on behalf of the 1<sup>st</sup> respondent that this matter is now moot and only of academic relevance given that the applicants have since lost possession of the property.

It was further averred on the strength of the *NetOne Cellular v Reward Kangai* case (*Supra*) that once a party loses possession of the subject matter on which a right of retention is predicated then *cadit quaestio* (the right of such retention naturally falls away). Reliance in this regard was placed on the following passage from the said judgment:

*“The possessor of a lien has a right of retention until he is compensated. It does not give rise to a cause of action. Where it is proved it is a valid defence in a claim for ejectment or rei vindicatio. The right is anchored on possession of the merx, once possession is lost the right no longer accrues.”*

Per contra, it was argued by the applicants that the 1<sup>st</sup> respondent cannot profit from a “subversion” of a pending matter before this court. They claim that the 1<sup>st</sup> respondent was fully aware that the second urgent chamber application had already been set down but nonetheless proceeded to obtain a warrant of their ejectment from the court, which warrant it proceeded to enforce. They therefore accused the 1<sup>st</sup> respondent of being in contempt of court and expressed the view that it should be denied audience until it has purged its contempt. They aver that the 1<sup>st</sup> respondent cannot purport to rely on an unlawful act on its part, namely the obtainment of a warrant for ejectment against the backdrop of the setting down of an urgent chamber application. Two interrelated issues emerge namely;

- a) Whether the obtainment of the warrant of ejectment by the 1<sup>st</sup> respondent was tainted by illegality to the extent that 1<sup>st</sup> respondent is precluded from relying on the ejectment of the applicants from the premises to ward off this application.
- b) What the legal consequences of the ejectment on the present application are, more precisely: -
  - i) Whether loss of possession of the property by the applicants (on account of the ejectment) *ipso facto* renders the review application moot, and;
  - ii) Whether the applicants have lost their right of retention on account of the ejectment from the premises.

Each of these will be considered in turn.

### **The legality of the warrant of ejectment obtained by the 1<sup>st</sup> respondent**

Owing perhaps to a lacuna in the rules of court in their present form, there is no rule of law which precludes a judgment creditor from executing on a judgment on account of the filing of an application (urgent or otherwise) for its stay. I am aware however, that the practice has always been to treat such an application differentially. This is perhaps in part out of a need to avoid a chaotic situation which would otherwise ensue should the application for stay eventually succeed when the judgment creditor has already executed (potentially with irreversible consequences). In part this is also on account of due deference to due process and the need to allow matters to take their natural course instead of a topsy-turvy scenario that would obtain if parties were allowed to latch onto and execute on what amount to interlocutory legal victories. However, as far as I know, this practice of treating the set down of such urgent chamber applications with deference has not crystallised into a rule of law nor is same yet to be incorporated into the rules.

Furthermore, it is trite that the filing of a review application does not suspend the operation of order against which a review application lies. That was the very reason why the urgent chamber application was filed in the first place.

### **The legal implications of the ejectment**

Although reliance was placed by the 1<sup>st</sup> respondent on the loss possession of the houses on the part of the applicants with its attendant relinquishment of the right of retention as the main

argument, I hold the view that it is the mootness of the argument that decides this preliminary point. This is because the question of retention is related to the merits of the application as opposed to the point *in limine*. The passage relied upon by the 1<sup>st</sup> respondent from the case of *NetOne v Reward Kangai (supra)* would have been relevant had it been raised as a defence to an application for the *actio rei vindicatio* brought by the 1<sup>st</sup> respondent and if the applicants (then as respondents) had since relinquished possession of the houses in question. This is the scenario that played out in the NetOne case. Put differently the ratio in that case is hardly applicable to a challenge on the propriety of a ruling granting execution pending appeal.

However, in my view, those events which subsequently played out as described earlier render the dispute in question moot. The very execution of the judgment of the court unquestionably render any debate regarding such execution particularly in circumstances such as the present merely academic. In *Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20/19 Malaba CJ, at pp. 7-8 had this to say on mootness of a dispute.

*“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court’s jurisdiction ceases and the case becomes moot... The question of mootness is an important issue that the court must take into account when faced with a dispute between the parties. It is incumbent upon the court to determine whether an application before is still presents a live dispute as between the parties. The questions of mootness of a dispute has featured reportedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate issues which are of “such a nature that the decision sought will have no practical affair or result..... A matter is not moot only at the commencement of the proceedings. It may be considered moot at the time the decision on the matter is to be made.... The mere fact the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the parties, that not without more render it [unjusticiable]. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. **JT Publishing (Pty) Ltd v Minister of Safety and Security** 1997 (3) SACC at 525A-B.”*

The court also referred to the matter of *Chombo v Clerk of Court Harare Magistrate Court (Rotten Row) and Others* CCZ 12/20 before summarizing the test as follows;

*“From the above authorities it can be deduced that in order for a matter to be moot, the court will have found events have occurred which overtake the dispute and terminate the controversy as between the parties. It is now trite that a matter is moot if further legal proceedings with regard to it can have no effect or events have placed it beyond the reach of the law. However, that is not the end of the matter as the fact that a matter has become moot does not automatically constitute a to a court to hear it. A court retains discretionary powers to hear a moot case where it is in the interests of justice for it to do so. S general rule courts must be wary of making a determination on a matter, which has been over taken by events or is not as such a determination leads to an ineffectual judgement.”*

In the context of this matter it would be an absurdity to continue to refer to whether an application for execution pending appeal should be granted, when such execution pending appeal has already taken place. It would be undesirable for instance to order that the applicants be allowed back into the premises as this potentially leads to disorder. In my view therefore, the matter has been overtaken by events and is now moot.

The applicants were their own worst enemies in filing defective urgent chamber application itself resulting in the 1<sup>st</sup> respondent seizing that narrow window of opportunity to swiftly obtain a warrant for their ejection from the houses in question.

Accordingly, the following order is hereby made:

**It is hereby ordered that:**

- a) The applicants’ preliminary point is hereby dismissed
- b) The execution pending appeal having been done, the 1<sup>st</sup> respondents point *in limine* is hereby upheld and the review application is hereby dismissed.
- c) The applicants to meet 1<sup>st</sup> respondent’s costs of suit jointly or severally, the one paying the others to be absolved.