LIBERATION MINING (PRIVATE) LIMITED
versus
ADLECRAFT (PRIVATE) LIMITED
and
OFFER SIVAN

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 24 March & 15 September 2021

COURT APPLICATION

S M Hashiti, for applicant
M Ncube, for the respondents

MANZUNZU J: This is a court application for leave to execute an order of this court in case number HC 5622/19 pending appeal.

The application is opposed by the respondents.

On 17 January 2020 the applicant obtained an order against the respondents in case number HC 5622/19 in the following terms;

"that;
1. The respondents return and deliver a new Terex J1160 Mobile Crushing Plant to the applicant within 7 (seven) days from the date of granting of this order.
2. Failure of which the Sheriff is hereby authorized to take all reasonable steps to ensure that the respondents complies with this order.
3. The respondents are jointly and severally liable for applicant's cost of suit which shall be payable on a legal practitioner and client scale."

Dissatisfied with the judgment the respondents noted an appeal to the Supreme Court on 7 February 2020 under case number SC 65/20. There are four grounds of appeal recorded as follows;

1. The court *a quo* erred at law in determining that there was no material misjoinder of the second respondent.
2. The court *a quo* erred and grossly misdirected itself in dismissing the preliminary point that there was a material dispute of fact.
3. The court *a quo* erred at law in finding that the respondent satisfied the requirements for *rei vindicatio* and that the appellants had no right to retain the property despite the fact that it is common cause that there was an extant contract between the parties governing the lawful possession of the property.

4. The court a quo erred and grossly misdirected itself in granting costs on a higher scale against the first and second appellant."

Pending the hearing of the appeal the applicant brings this application seeking an order as follows;

"IT IS ORDERED THAT:
1. The applicant is hereby granted leave to execute its order against the respondents granted by this Honourable Court in Case HC 5622/19 dated 17th of January 2020 pending the appeal filed by the respondent in case number SC 65/20.
2. Respondent to pay applicant's costs of suit on a legal practitioner and client."

What then are the requirements of an application for leave to execute pending appeal? In *ZCFU* v *Gambara* HH 375/15 MAFUSIRE J had this to say;

"In an application for leave to execute pending appeal the following factors are considered:
(i) The preponderance of equities; that is to say the potentiality of irreparable harm and prejudice to the applicant if leave to execute is refused, or the potentiality of irreparable harm and prejudice to the respondent if leave to execute is granted,

(ii) The prospects of success of the appeal, whether the appeal is frivolous or vexatious or has been noted not with a genuine intention of correcting a perceived wrong but merely in order to buy time,

(iii) If the competing interests are equal, then the balance of hardship to either party.
see *Graham* v *Graham* 1950 (1) SA 655 (T); *Zaduck* v *Zaduck (2)*1965 RLR 635 (GD); 1966 (1) SA 550 (SR); *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534; *Fox & Carney (Pvt) Ltd* v *Carthew – Gabriel (2)* 1977 (4) SA 970 (R); *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H); *ZDECO (Pvt) Ltd v Commercial Carriers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H); *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (HC).

These factors are considered cumulatively. The court has an inherent power to control its own process. Thus, in the exercise of its wide discretion it can order a stay of execution or order that the judgment be carried into execution. The court strives to achieve real and substantial justice."

The learned Judge also cited with approval a passage in *Santa Insurance Company Limited* v *Paget* 1981 (2) ZLR 132 that;

"As observed by GOLDIN, J., as he then was, in *Cohen* v *Cohen (1),* 1979 R.L.R. 184 (G.D.); 1979 (3) S.A. 420 (R.) at 423 B – C, the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore in the execution of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham* v. *Graham,* 1950 (1) S.A. 655 (T.) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or, to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice."

The onus is on the applicant to show that it is just and equitable that the applicant be granted leave to execute pending appeal. It is a balancing act by the court in the exercise of its judicial discretion. On the one hand a party who has won through the due process of the law is expected to enjoy the fruits of his victory and yet on the other hand a party who has the right to appeal and test the correctness of the court's decision must not suffer prejudice before what he/she believes in has been determined.

In *Net One Cellullar (Pvt) Ltd* v *Net One Employees & Anor* 2005 (1) ZLR 275 (S) the court had this to say;

> "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 to 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." (emphasis is mine)

Simply put, the court should look at the circumstances of the case and ask itself the simple question as to how each party is affected by the granting or refusal to grant leave to execute and then weight the two effects and say what is just and equitable. In assessing the effects, the court is guided by factors of irreparable harm or prejudice likely to be suffered by either party and whether or not there are prospects of success on appeal. At the end of the day each case must be treated according to its own merits.

a) Potentiality of harm or prejudice:

There is no full judgment in this matter which the respondents say has not been availed despite such request. But the parties agree the order granted by the court in HC 5622/19 is a *rei vindicatio*. In other words it is based on a finding that the applicant is the owner of the property that the respondents were ordered to return to the applicant.

The applicant has alleged that the respondents have not been diligent enough to prosecute their appeal since 7 February 2020 and that the respondents have made no efforts to obtain judgment.

The applicant further claims will suffer irreparable harm and prejudice if leave to execute is refused. This is because not only has the applicant been deprived of its property for a long time since 2019 but applicant believes the respondents are using the machine for economic gain depreciating it. In order to stop that, the applicant proposes to keep the machine while the respondents prosecute their appeal.

The respondents however said despite numerous efforts to obtain judgment they were not successful. They accused the applicant of usurping the powers of the Supreme Court in trying to have a *rei vindicatio* re-heard indirectly. I disagree with that position because this application is properly before this court and must be determined on the merits.

The respondents allege the applicant suffers no prejudice because the machine is not perishable. They deny that they were using the machine. They maintained the existence of an extant contract between the parties which entitles them to possession of the machine though such cannot have a greater right than the extant order of this court to return the machine.

The applicant apart from the mere say so has not shown proof that the respondents are using the machine and more so for economic gain. There is no irreparable harm proved.

b) Prospects of success on Appeal

The following grounds of appeal were raised by the respondents;

1. "The court *a quo* erred at law in determining that there was no material misjoinder of the second respondent.
2. The court *a quo* erred and grossly misdirected itself I dismissing the preliminary point that there was material dispute of fact.
3. The court *a quo* erred at law in finding that the respondent satisfied the requirements for rei vindication and that the respondents had no right to retain the property despite the fact that it is common cause that there was an extant contract between the parties governing the lawful possession of the property.
4. The court *a quo* erred and grossly misdirected itself in granting costs on a higher scale against the first and second appellant."

The applicant took the position that the respondents' appeal has no prospect of success and it is frivolous and vexatious and that it was noted not with a genuine intention of correcting a perceived wrong but merely in order to buy time. The applicant proceeded to analyse all the grounds of appeal and concluded how in its view such could not defeat the right of ownership. While respondents relied on a contract between the parties, the applicant was quick to say there was no proof of payment and in any event respondents could only rely on the right to possession which is no greater than a right of ownership. But ground number three of appeal is a challenge that the requirements of *rei vindicatio* were not met.

While arguments were advanced for the parties, there was a lot of reference to the evidence produced before the court which ordered the return of the machine. The question is how did the court analyse and determine the evidence? What this court has is the version of the parties without the benefit of any judgment. This is despite the court being called upon to consider the prospects of success on appeal or otherwise. The court cannot make a value judgment in the absence of the judgment under attack. This court cannot rely on the understanding of the parties of the reasoning of that court. While the respondents claim some challenges in obtaining the judgment appealed against, it remains the duty of the parties to avail that judgment for this court to assess for itself if indeed there are any prospects of success on appeal.

The same goes for the appeal before the Supreme Court. I do not see the court proceed to hear the appeal in the absence of the judgment. An appeal is against the judgment of the court, that is its findings of fact and conclusions of law which have led to certain orders.

For these reasons I find no basis to disturb the status *quo ante*.

Disposition

The application be and is hereby dismissed with costs.

Henning Lock, applicant's legal practitioners
Devittie, Rudolf and Timba, respondents' legal practitioners