

ZVISHAVANE TOWN COUNCIL
versus
ERRYMAPLE COLLEGE
and
THE SHERIFF N.O

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 JUNE AND 9 JULY 2015

Urgent Chamber Application

Mr *E. Mlalalazi* for the applicant
D. Charamba for the respondent

MOYO J: This is an urgent application wherein applicant seeks the following interim relief:

“That pending the determination of this matter, the applicant is granted the following relief:

- a) The execution of the judgment granted by the magistrates court sitting at Zvishavane in 934/14 be and is hereby stayed.
- b) The second respondent be and is hereby interdicted from removing the applicant’s property and if already removed that he be ordered to return it forthwith.”

At the hearing of the application, I granted the provisional order and stated that my detailed reasons would follow, here are they:

Applicant is Zvishavane Town Council, part of its mandate is to offer and sell vacant stands to individuals. It is alleged that sometime at a prize giving ceremony at first respondent’s premises (first respondent being an educational entity), Councillors who attended the prize giving ceremony were requested by a representative of the College to offer the college an adjacent vacant stand. The Councillors purportedly offered the representative of first respondent the stand and advised her that she could move in, and that they would get council to ratify the

offer. No paper work followed. No council resolution was passed to the effect that council was offering first respondent the stand. No payments were effected with regard to the stand. In other words no contract was ever entered into between applicant and first respondent with regard to the stand in dispute. First respondent however, immediately moved into the vacant stand on the strength of the word of the councillors who had attended the prize giving ceremony. She claims to have effected improvements thereon. She also claims that this dispute arose when council got wind of her occupation on the stand and advised her to vacate through a letter as she unlawfully occupied same. In fact according to applicant's counsel, the stand is owned by a third party which is a church and was never offered to or sold to first respondent.

When first respondent received the letter from council she then sought to enforce "the contract." She allegedly obtained a default judgment against council at the Zvishavane Magistrate's court. Applicant then applied for rescission of judgment which was dismissed. They then appealed to this Honourable Court against the dismissal of the application for rescission of judgment and the appeal is still pending. First respondent then applied for leave to execute the judgment of the magistrates court pending appeal.

Such request was granted despite the glaring hollowness of the so called contract. Applicant cited irregularities in the granting of the application for leave to execute pending appeal, it therefore applied for a review of the magistrates decision to grant leave to execute pending appeal before this Honourable Court. The application for review was filed and the appeal are now both pending before this court. The applicant now seeks the intervention of this court to stay the execution pending the application for review.

This is a very straightforward matter, there are pertinent issues that go to the very root of the so called contract between the parties. So for the magistrate to grant a party leave to execute pending appeal is inappropriate in my view as it renders an appeal on very important and critical issues, a mere academic exercise. It is for these reasons that I granted the provisional order. In my view, leave to execute pending appeal should be granted in exceptional circumstances, where an appellant has prospects of success, the court can not turn a blind eye on that fact and decide that whatever might be the outcome of the appeal, one party should enjoy the effect of a

judgment which is the subject of an appeal. In the case of *Reid and Another v Godard and Another* 1938 AD 511 at 513, DE VILLIERS JA stated thus:

“The foundation of the common law rule as to the suspension of a judgment on the noting of an appeal, is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by levy under writ, or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed against.”

Accordingly by allowing the first respondent to execute a judgment which was obtained on the basis of an obscure cause of action would result in irreparable harm being suffered by applicant and therefore this would amount to a miscarriage of justice.

I accordingly granted the provisional order for the aforestated reasons.

Chidawanyika, Chitere and Partners, applicant’s legal practitioners
Mutendi, Shumba and Partners, 1st respondent’s legal practitioners