HB 37/18
HC 3093/17
X REF HC 2491/14; 2696/15; 2707/15;
2931/16; 2307/17; 2314/17

GOLDEN RIBBON PLANT HIRE (PVT) LTD

Versus

TRASTAR (PVT) LTD t/a TAKATAKA PLANT HIRE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 5 DECEMBER 2017 & 22 FEBRUARY 2018

Urgent Chamber Application

Ms P. Mudisi for the applicant
V. Bhebhe for the respondent

TAKUVA J: This is an application for leave to execute pending appeal made on urgent basis.

The background facts reveal a long outstanding dispute arising from respondent's refusal or neglect to perform its contractual obligations. The full facts are as follows:

Applicant issued summons together with the declaration against respondent under case number HC 2491/14 for payment of US$87 288,52. Applicant had in accordance with an agreement, hired out its equipment to the respondent at the rate of US$100,00 per hour. Respondent had breached the agreement and applicant served the summons on 12 November 2014. On 20 November 2014, respondent entered appearance to defend through its erstwhile legal practitioners.

The applicant filed a notice to plead and intention to bar on 31st March, 2015. The notice was duly served on respondent's legal practitioners on 9 April, 2015. Respondent did not file its plea and was automatically barred leading to the application for a default judgment on 13 April 2015. The application was duly granted and the applicant instructed the Sheriff to attach the respondent's property. In response, respondent applied for rescission of the default judgment

under case number HC 2696/15. It also applied for stay of execution under case number HC 2707/15. The application for rescission was dismissed.

After the dismissal of the application for rescission applicant instructed the Sheriff to go ahead with the attachment. The Sheriff filed a *nulla bona* return leading applicant's legal practitioners to instruct the Sheriff to attach the respondent's director's property. Respondent's director who had been disposing to all the affidavits by respondent in all the matters, claimed ownership of all the property attached by the Sheriff. The Sheriff then filed an interpleader under case number HC 2931/16 which was granted in favour of the applicant.

Again, basking in its success, applicant instructed the Sheriff to proceed with the execution of the judgment. Respondent's director who was the claimant in the interpleader application approached applicant's legal practitioners for a payment plan on behalf of the respondent. The parties agreed that respondent would pay a sum of US$20 000,00 on 28 August 2017 and the balance would be paid over a period of 6 months, failure of which the applicant would instruct the Sheriff to go ahead with the sale. Respondent did not honour his word and applicant instructed the Sheriff to proceed with the sale.

Respondent filed yet again an application for rescission under case number HC 2307/17 together with an urgent chamber application for stay of execution under case number HC 2314/17. I dismissed the urgent chamber application on 10 November 2017. The respondent then appealed against my judgment on 16 November 2017 under case number SC-954-17. The notice of appeal was served on the Sheriff at 10:45 am on 17 November 2017 forcing him to suspend execution pending the outcome of the Supreme Court appeal. The Sheriff made his position clear in a letter to the applicant dated 21 November 2017. The noting of appeal has triggered this application.

The Law

The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and if leave be granted to determine the conditions upon which the right to execute shall be exercised. It is settled law that in exercising that discretion the court should determine what is just and equitable in all the circumstances. This is necessary because the common law rule suspending execution of a judgment upon the noting of an appeal is founded upon the avoidance of irreparable harm to the intending appellant.

In *South Cape Corporation (Pvt) Ltd v Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A) CORBETT JA stated the considerations relevant to the grant of an application for leave to execute pending appeal as:

> "(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 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."

Before I apply these principles to the facts *in casu*, let me deal with a preliminary point raised by the respondent regarding lack of urgency. Respondent argued that the certificate of urgency does not exhibit the requirements for urgency in that it states that respondent is trying to buy time and that it once made a chamber application for stay. I do not agree with this argument because the certificate of urgency shows that one of the reasons the matter should be treated as urgent is that since the respondent approached this court on an urgent basis in its application for stay of execution which was dismissed and it appealed, this reverse application seeking leave to execute pending appeal ought to be treated as urgent.

In my view, from the cause of action (which is the noting of the appeal) and the nature of the relief sought, this matter is one which cannot wait for ordinary set down. Also, the applicant has treated the matter urgently and did not wait for the day of reckoning in that it acted within 48 hours after being notified of respondent's appeal to the Supreme Court. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H).

For these reasons I find that the point *in limine* has no merit and it is hereby dismissed.

Turning to the merits, the 1st requirement is that the potentiality of irreparable harm or prejudice being sustained by the appellant (respondent in this application) if leave to execute were to be granted. *In casu*, the respondent will not suffer any harm, never mind irreparable harm if judgment is executed. This is so because respondent consented to owing the applicant an amount in the sum of US$66 788,52 which is 77% of the US$87 288,52 granted to the applicant. The amount admitted arises from the contract. While arguing that the amount claimed by the applicant has been inflated the respondent did not show how. Also the background facts show that top in the respondent's mind is how to evade payment.

As regards the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in this application) if leave to execute were to be refused, it should be noted that the applicant has waited since 2014 to be paid for the service he rendered in terms of the agreement. The respondent has not denied that applicant provided the Excavator and 2 operators at its disposal in terms of the contract of hire between the parties. Respondent's gripe with the amount is two-fold. Firstly it erroneously submitted that applicant is claiming "damages" which should be "quantified" first when the true position is that these are not "damages" but specific amounts calculated on the basis of clause 3(e) of the agreement which states;

> "(e) The hirer's supervisor and the owner's operator shall sign the Time Record Sheets daily and their signatures shall bind the owner and the hirer to accept the hours on the Time Record Sheets."

Secondly, respondent challenged the amount on the grounds that the parties' agreement was subjected to "novation" without providing any shred of evidence of such an agreement. It is respondent's argument that it is only mandated to pay applicant as and when respondent receives payment from Marange Resources. That the two arguments are mutually exclusive is self-evident. What is clear is that respondent is clutching at straws in a bid to evade its obligations at all costs. There is nowhere in the parties' agreement where their relationship is described as that of main contractor and sub-contractor.

The court must also examine the prospects of success on appeal. The particular question to be looked into is 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 to harass the other party. *In casu*, the respondent does not enjoy good prospects of success on appeal because his grounds of appeal are a repetition of his argument that I dismissed under case number HB-355-17. For example, respondent keeps on harping on the fact that it has good prospects of success in the appeal because the <u>"damages that were granted to the applicant were not quantified".</u> (my emphasis)

I dealt with that point in my judgment under HB-355-17 in the following manner;

> "A perusal of the agreement reveals in paragraph 3(a) that the hirer shall hire the excavator at a dry rate of US$100,00 per hour, exclusive of any applicable VAT. At the heart of this case is the non-payment of hire charges and applicant does not deny owing the 1st respondent at least US$66 788,52 as hiring charges …"

Further, I also dealt with the fact that the default judgment was not obtained in error and that the respondent had no prospects of success in the application for rescission under case number HC 2307/17. That application has since been dismissed by MATHONSI J in judgment number HB-4-18 delivered on 25 January 2018. I have no doubt in my mind that the intended appeal is frivolous and vexatious in that what the respondent wants is to simply buy time. In any event, assuming the Supreme Court agreed with him that I erred in dismissing his application for stay of execution pending the determination of his application for rescission of a default

judgment granted under case number HC 2491/14, that order will be of academic interest only because respondent's 2nd application for rescission has since been dismissed with costs at a higher scale by MATHONSI J. The applicant has surely tried every trick in the book. He has unsuccessfully resorted to r63 where BERE J dismissed his application. He then invoked r449 but also met the same fate before MATHONSI J who commented on the application as follows:

> "It has all the hallmarks of a litigant who will do anything and say anything including the absurd only to avoid paying what is owed."

The balance of hardship or convenience does not arise *in casu* because there is virtually no potentiality of irreparable harm or prejudice to the respondent.

I come to the conclusion that the application for leave to execute pending appeal has merit. In the result it is ordered that pending the determination of this matter the applicant is granted the following relief:

1. Leave be and is hereby granted to the applicant to execute the judgment granted by this court in case number HC 2491/14 pending determination of the appeal noted by the respondent in case number SC-954/17.

Mutendi, Mudisi & Shumba, c/o Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Chinyama & Partners, respondent's legal practitioners