NEVERMIND CHINGWENA
versus
SMM HOLDINGS (PVT) LTD
AND THE ADMINISTRATOR
and
THE SHERIFF OF COURT N.O

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 31 JANUARY 2018 AND 12 APRIL 2018

Urgent Chamber Application

S Chivivi for the applicant
P Chigariro for 1st the respondent
No appearance for the 2nd respondent

TAKUVA J: The applicant was employed by the first respondent. As part of his employment benefits, applicant was allocated house number 36 School Avenue Noelvale Zvishavane. Between 11 and 20 March 2011 applicant deserted from work and was dismissed after due process on 27 March 2011. The applicant did not appeal against the dismissal which still stands to date. The first respondent considered the contract of employment effectively terminated thereby stripping the applicant of all rights that had accrued to him as a consequence of the employment relationship.

Applicant remained in occupation of first respondent's property prompting the latter to issues summons for eviction on 23 August 2016. Applicant entered appearance to defend and filed his plea on 28 September 2016. On or about the 31 August 2017, first respondent filed an application for summary judgment under case number HC 1101/17. A default judgment was subsequently granted against applicant. First respondent obtained a warrant of ejectment and served it on applicant's sister on 12 January 2018. The applicant then filed this application for stay of execution arguing that neither his legal practitioners nor his corresponding lawyers received the application for summary judgment. The relief he seeks is as follows;

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

1. The warrant of ejectment issued on 12th day of January 2018, be and is hereby stayed pending the determination and finalization of the application for rescission of summary judgment which will be filed within 5 days.
2. In the event that the applicant and all those claiming right through him have been evicted be restored possession of house number 36 School Avenue Noevale, Zvishavane pending the determination and finalization of the application for rescission of summary judgment."

Applicant contended that the matter is urgent because he was facing ejectment in a matter of hours. He claimed that the balance of convenience favours the granting of this application in that if the application for rescission is not granted, first respondent will still be entitled to reclaim its house while if he is evicted before the determination of his application for rescission he will not be able to have possession of the house, because first respondent intends to allocate it to a new tenant. Further, applicant submitted that he will suffer irreparable harm if this application is not granted in that first respondent owed him US$23000-00 being salary arrears and if execution is not stayed, he will not have any recourse to the law because first respondent is "immune to law suits" by virtue of the provisions of the RECONSTRUCTION OF STATE INDEBTED INSOLVENT COMPANIES ACT [Chapter 24:24].

Applicant also argued that he will suffer heavy prejudice if the warrant for ejectment is not stayed in that he has no alternative accommodation for his family that includes children who are attending school in Zvishavane. He said he was surprised by the warrant of eviction because he had not been served with the application for summary judgment. While admitting that according to the certificate of service filed by the first respondent, the application for summary judgment was served on one Edwin Mafa in the employ of his corresponding legal practitioners, he insisted that his lawyers told him that Mafa denied being served with the application. In this regard, he filed a supporting affidavit from his legal representative confirming that Edwin Mafa denied ever receiving the application for summary judgment. Surprisingly applicant omitted to file an affidavit from Edwin Mafa himself.

During argument it was conceded that applicant lost his right to continue to enjoy benefits after the termination of the contract of employment. It was nevertheless argued that his

defence in the application for rescission would be that he is owed salary arrears by the first respondent who was served with this claim. He lamented the difficulty of suing the first respondent due to its status.

The first respondent opposed the application on the following grounds;

"(a) there is no accompanying urgency as to warrant the relief sought,
(b) there is no fear of an imminent harm and or fear of an injustice being done should the relief sought be denied.
(c) the applicant has not established that he has a clear or *prima facie* right that would entitle him to get the relief of stay of execution against an order for his eviction from a company house that he is occupying following termination of his employment contract on March 2011.
(d) applicant has not shown that the balance of convenience is in favour of granting the remedy."

As indicated above the applicant has approached this court for a stay of execution pending the filing and determination for rescission of the default judgment granted under HC 1101/17.

The principles that a court must have regard to in an application for stay of execution are akin to those considered when deciding whether or not to grant leave to execute pending appeal – see *Nzara* v *Tsanyau and Others* 2014 (1) ZLR 674 (H) *Old Mutual Life Assurance Company (Pvt) Ltd* v *Makgatho* HH 39-07. They are:

"1. An appellant has an absolute right to appeal and test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
2. Execution of the judgment of the lower court before the determination of the appeal will regate the absolute right that the appellant has and is generally not permissible.
3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal resting in the appellant.
4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporations (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
5. Where the judgment sounds in money and the successful party offers security *de*

restituendo and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.

6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospects of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed (see *Woodnov Edwards and Another* 1966 RLR 335."

What must be interrogated in this matter are the applicant's *bona fides* in bringing an application for rescission of a default judgment. In order to show good and sufficient cause under rule 63 of the High Court Rules 1971, for rescission, an applicant has to give a reasonable explanation for the default, the *bona fides* of the application for rescission of judgment and the prospects of success on the merits. These factors are considered cumulatively and not individually. See *Earth Moving and Construction Company (Pvt) Ltd* v *Gurupira and Others* 2014 (1) ZLR 304 (H); *Roland and Another* v *McDonnell* 1986 (2) ZLR 216 (S); *Stockil* v *Griffs* 1992 (1) ZLR 172 (S) *Sibanda* v *Ntini* 2002 (1) ZLR 264 (S).

Let me deal first with the reasonableness of the applicant's explanation for the default. It is noteworthy that he has given two conflicting explanations. Firstly he contended that "As such neither my legal practitioner nor any corresponding lawyers received the application for summary judgment" see paragraph 17 of applicant's founding affidavit. Secondly it was argued that Edwin Mafu was served with the application but instead of sending it to applicant's lawyers, he simply sat on it. This was despite applicant's lawyers having been furnished with a copy of the certificate of service with a stamp from Sansole and Senda, the corresponding legal practitioners showing that the application for summary judgment had been served on one Edwin Mafu on 20 April 2017. The applicant did not bother to file Mafu's affidavit with this application. Also, applicant did not bother to peruse the file or contact the Assistant Registrar between August 2017 and January 2018. In the absence of a supporting affidavit from Mafu, this court is left to speculate on what happened between Mutendi, Mudisi and Partners and Sansole and Senda. In the result, the explanation remains somewhat murky and unreasonable.

As regards applicant's *bona fides*, the fact that he conceded that he does not have any residual right to occupy the house after the termination of the contract of employment demonstrates clearly that his intended application is *mala fide*. This is especially so if one has regard to applicant's contention that he is owed US$23000-00 in salary arrears. What is

surprising is that applicant has not placed any evidence of his efforts to recover this money in the past seven (7) years. In any event, this fact does not constitute a defence as will be shown later in this judgment.

An examination of the merits of this application coupled with any prospects of success of the application for rescission shows that the applicant is motivated by a desire to either buy time or harass the first respondent. The applicant has not established that he has a clear or *prima facie* right that permits him to continue holding to the first respondent's property following the termination of the contract of employment. For starters, section 12 (6) of the Labour Act [Chapter 28:01] clearly supports the first respondent's position. It states;

> "Whenever an employee has been provided with accommodation directly or indirectly by his employer, the employee shall not be required to vacate the accommodation before the expiry of a period of one month after the period of notice specified in terms of subsection (4) or (5)."

The Collective Bargaining Agreement Mining Industry (General Conditions) Statutory Instrument 152/90 also makes provision for the period within which an ex-employee is required to vacate premises after termination of the employment contract. Section 25 (2) (a) (b) provides;

> "An employee who is in occupation of premises belonging to his employer shall;
> If he occupies married quarters and his employment is terminated he shall be allowed a reasonable period of not less than 21 days from the date of termination of employment to vacate such premises."

On this basis the applicant was required by law to vacate first respondent's premises within the stipulated period after the termination of his employment contract. The fact that applicant was owed arrear salaries is not a valid reason to continue residing in the company house after his contract had been terminated. In a number of decided cases, the courts have repeatedly ruled that once a contract of employment has been suspended or terminated an employee would not be entitled to the continued enjoyment of benefits comprising the free occupation of company property – see for example *Chisipite School Trust (Pvt) Ltd* v *Clark* 1992 (2) ZLR 324; *Arundel School Trust* v *Pettingrea* 2014 (1) ZLR 596; *Jakazi and Another* v *Church of the Province of Central African and others* 2010 (1) ZLR 335 (H); *Hamtex Investments (Pvt) Ltd* v *King* 2012 (2) ZLR 334.

On the facts of this case, it cannot be said that applicant would suffer an injustice or irreparable harm if the stay were not granted. The onus is on the applicant to prove irreparable harm that would have justified the granting of the stay of execution. In *Chibanda* v *King* 1985 (1) ZLR 116 DUMBUTHSENA AJP held that;

> "In an application for stay of execution of the judgment of the court, it is not enough for the applicant merely to allege hardship. He must satisfy the court that he may suffer irreparable harm or prejudice if execution is granted ---- it must also be borne in mind that if the court were to extend mercy, it would be doing it at the expense of a litigant who has already established in court his right and title to what is being claimed. Such mercy should rather be sought in the action itself before judgment is given not afterwards."

It is trite that the power to grant stay of execution is a common law exercise of the power that inheres in the court. This discretion is very wide but the main guiding principle for the court I determining such an application is to grant stay where real and substantial justice requires such a stay or conversely where injustice would otherwise be done –see *Mungwambi* v *Ajanta Properties (Pvt) Ltd* HH 771/08.

In *casu*, the applicant cannot be said to suffer injustice if the application is declined in that his eviction will not extinguish his claim for arrear salaries. There is therefore no harm to talk about, nevermind irreparable harm. The applicant has got no defence against the claim for summary judgment that was granted. Also, his proposed application for rescission has no legal basis as it is anchored on blatant untruths and misrepresentations of the circumstances leading to the default judgment.

Applicant has other available and satisfactory remedies. He has stated in unequivocal terms that the reason he is refusing to vacate the company house is the fact that he has not been paid his arrear salaries. Although he has filed no proof of such liability on the part of the first respondent, he is at liberty to sue the first respondent for the payment of any such claim. He does not have to remain in the house in order to successfully sue the first respondent. All he has to do is to comply with the mandatory provisions of section 6 (b) as read with section 18 (e) of the RECONSTRUCTION OF STATE INDEBTED AND INSOLVENCY COMPANIES ACT [Chapter 24:27].

In my view, the balance of convenience would best be served if applicant is denied the relief he seeks. This is so because the house was allocated to the applicant as an employment benefit during the tenure of his employment contract. That contract was terminated on 30 March 2011 leaving no residual right or legal entitlement on the part of the applicant to the continued free occupation of that house. His continued free occupation of the house will greatly prejudice the first respondent in lost rentals. Already first respondent has lost US$26640-00 in unpaid rentals over the past 6 years of applicant's unlawful occupation of the property. It is common cause that during these 6 years, applicant did not render any service to the first respondent.

On the other hand, if the application is dismissed, applicant will simply pursue his claim against first respondent. It is laughable for lack of a better word to suggest that applicant cannot secure alternative accommodation in Zvishavane.

All in all, I associate myself with the comments by DUMBUTHSENA J (as he then was) in *S* v *Mcnal* 1986 (2) ZLR 280 where he said while considering whether a party should be punished for the negligence of his legal practitioners;

> "In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Salogee and Another* v *Minister of Community DVT supra* at 141 C- E when he said;
> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. In fact this has lately been burdened with an undue and increasing number of applications for condonation on which the failure to comply with the rules of this court was due to neglect on the part of the legal practitioners. The Attorney after all is the representative whom the litigant has chosen for himself and there is little or no reason why in return for condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship no matter what the circumstances of the failure are."

In the present case, applicant's legal practitioners negligently failed to comply with a peremptory provision of the rules. In my view it is not an acceptable explanation for a legal practitioner to come to court nine months after the *dies induciae* has elapsed and simply say that they did not see the court application for summary judgment contrary to hard evidence showing service and receipt of such an application. Such an explanation is an insult to the intelligence of the court, making it more difficult for this court to be satisfied of the applicant's good faith.

In the result, the application for stay of execution is hereby dismissed with costs.

Mutendi Mudisi and Partners' applicant's legal practitioners
Chigariro Phiri and partners, c/o Dube Tachiona & Tsvangirai 1st respondent's legal practitioners