

C.G. TOMMY

Versus

MICHAEL JOHN GUNN

And

LINDY GUNN

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MOYO JJ
BULAWAYO 11 FEBRUARY 2019

Civil Appeal

D. Dube for the applicant

S. Tshumele for the respondents

MAKONESE J: This is an appeal against the judgment of the Magistrates' Court sitting at Bulawayo on the 15th February 2019.

The background to the case is that the respondents instituted action in the Magistrates' Court seeking *inter alia* the eviction of the appellant and payment of arrear rates in respect of an immovable property known as 4 Clocolon Road, Burnside, Bulawayo. The appellant defended the matter. The matter was set down for a pre-trial conference. The appellant and her legal practitioner failed to attend court on the date of the pre-trial conference. The respondent applied for and obtained leave to file an application to strike out the applicant's defence. The application was made and the order was granted. The appellant has appealed against the judgment of the magistrate striking off the appellant's defence.

The respondents filed an application for leave pending appeal. The application was duly opposed. The application was set down for hearing and granted in favour of the respondents. The respondents perceive the issue raised for determination as the following:

- (a) Whether the order being appealed against is appealable.

It is common cause that the notice of appeal filed under case number HCA 15/18 was noted against the decision of the court *a quo* granting leave to execute and order pending appeal. It is an established principle of our law that no appeal shall lie against an order for leave to execute pending appeal as the said order is interlocutory in nature. It does not give a final determination of the matter. In *Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd* 1997 2 436 it was held that;

“An appeal against an order of leave to execute an order of ejectment pending appeal was invalid as the order did not have a final or definitive effect on the main appeal.”

In any event, the appeal is hopelessly without merit and a gross abuse of court process. 1st respondent is the registered owner of 4 Clocolon Road, Burnside, Bulawayo. The appellant has been in occupation of the property since 2004. During the course of appellant’s stay at the premises she incurred rates arrears on the property amounting to US\$1 500 as at 4th December 2016. Summons were issued against the appellant seeking an order for payment of arrear rates and eviction from the property together with costs of suit. The appellant raised spurious defences and sought to cling to the property at all costs. The magistrate in the court *a quo* in granting the application came to the conclusion that the respondents would suffer irreparable harm by the continued occupation of the premises by the appellant. The trial magistrate held that the appeal by the appellant was frivolous and only meant to delay execution of a judgment properly obtained. The magistrate proceeded to grant the application for leave to execute pending appeal as it satisfied all the requirements of the law.

We are satisfied that this appeal has no merit and accordingly, the appeal is dismissed with costs.

Moyo JI agree

Mathonsi Ncube Law Chambers. Applicant’s legal practitioners
Messrs Dube-Banda, Nzarayapenga & Partners, respondent’s legal practitioners