

FARAI MARUME
versus
TONDERAI GWARADA
and
TENDA TRANSPORT SERVICE (PVT) LTD
and
ENERST TAURAYI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 MARCH 2013 AND 03 APRIL 2013

T.S. Manjengwa, for the applicant
A. Mutungura, for the respondents

Opposed Application

MATHONSI J: This is an application for leave to execute the judgment of KARWI J issued on 21 March 2012 in favour of the applicant against the 3 respondents jointly and severally for payment of \$6264-75 being costs of repairing a commuter omnibus and \$17 840-00 being damages for loss of income together with interest on both sums at the prescribed rate from the date of summons to date of payment and costs of suit.

The respondents were aggrieved by that judgment and noted an appeal to the Supreme Court in SC 95/12 which is yet to be determined. The applicant was of the firm view that the appeal was noted to gain time without any desire to test the correctness of that judgment. He then made this application for leave to execute pending appeal.

On 15 April 2010 at about 1900 hours along Chimanimani Road in Mutare a Mercedes benz motor vehicle belonging to the third respondent and being driven by the first respondent was involved in a collision with a commuter omnibus belonging to the applicant and being driven by one Moreblessing Magweka which was damaged as a result.

The applicant sued for damages for repair costs and loss of business alleging that the collision was caused solely by the negligence of the first respondent who was acting within the course and scope of his employment by the second respondent. He sought to hold the third

respondent liable on the basis that he was the director and chief executive officer of the second respondent who had authorised the first respondent to drive his vehicle despite the fact that he had no valid driver's licence.

The respondents contested the action on the basis that the first respondent was not acting within the course and scope of his employment by the second respondent when the collision occurred as he was employed merely as a general hand and not as a driver. They denied that the driver of the Mercedes benz was unlicensed. The third respondent specifically denied authorising the 1st respondent to drive the vehicle he had bought for his son.

The trial judge found that there were glaring inconsistencies in the respondents' case and concluded that the first respondent was driving the vehicle within the course and scope of his employment and as such the second respondent was vicariously liable for the damages sustained by the applicant. The judgment is however silent on the liability of the third respondent who was also ordered to pay the damages.

The respondents raised a number of grounds of appeal taking issue with the assessment of the evidence by the trial judge. They challenged the finding that the second respondent was vicariously liable for the delict of the first respondent especially as the accident occurred at 1900 hours well after working hours. They also contested the trial court's finding on the quantum of damages.

The respondents were barred by reason of failure to file heads of argument timeously. I therefore refused to hear Mr Mutungura for the respondents for that reason. However in terms of rule 238 (2b) of the High Court Rules, I proceeded to deal with the matter on the merits.

What the court has regards to in an application of this nature was set out by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545 as follows:-

“ 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 to, *inter alia*, 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 was refused;-
- (3) the prospects of success on appeal, including more particularly the question of 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 the appellant and the respondent, the balance of hardship or convenience, as the case may be.”

The above formulation has been embraced in our jurisdiction in a series of cases: *Dabengwa & anor v Minister of Home Affairs 1982 (1) ZLR 223 (H) at 225*; *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd 1989 (1) ZLR 152 (H) at 155*; *Zdeco (Pvt) Ltd v Commercial College (1980) (Pvt) Ltd 1991 (2) ZLR 61 (H) at 63*; *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho HH 39/07 (unreported)*.

In *Old Mutual Life Assurance Company (Pvt) Ltd* (supra) at pages 4-5 MAKARAU JP (as she then was) went on to state that:-

“The position as stated in the decided cases then appears to me to be as follows:-

1. An appellant has an absolute right to appeal and to 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 negate 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 vesting in the appellant.
4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporation, (Pvt) Ltd v Engineering Management Services (Pty) Ltd* (supra).

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 will be defeated if execution were to proceed. (See *Wood NO. v Edwards & Anor* 1966 RLR 335)".

I have thoroughly read the judgment of the trial judge which has been appealed against as well as the grounds of appeal filed in the Supreme Court. In my view, it cannot be said that the appeal has been noted without the *bona fide* intention of testing the correctness of that judgment. Indeed the respondents raise very pertinent issues relating to vicarious liability and the quantum of damages which they are entitled to bring before the appellate court.

If execution is allowed to proceed before the appeal is determined, clearly there will be irreparable harm or prejudice suffered by the respondents in that their property will be sold thereby rendering nugatory their absolute right to appeal. On the other hand, I do not think there would be irreparable harm suffered by the applicant by any delay in enjoyment of the fruits of the judgment of the trial court. After all he has been waiting since the accident occurred in 2010.

I have a wide general discretion to grant or refuse leave to execute pending appeal and in the exercise of that discretion I am of the firm view that it is just and equitable to uphold the respondents' absolute right to appeal. I am in total agreement with the sentiments of MAKARAU JP (as she then was) in *Old Mutual (supra)* at page 6 that;-

“.....the appellant'(s) absolute right to appeal must be upheld at all times unless it is clear to the court that the appeal has been noted not with the genuine intention of testing the correctness of the judgment appealed against and that execution pending appeal will not have the effect of defeating the appellant's absolute right.”

Regarding the issue of costs, the respondents' have been tardy in the prosecution of their opposition they having failed to file heads of argument timeously. The decision to uphold their right of appeal and refuse the application has been arrived at without any benefit from their contribution. They are therefore not entitled to costs of suit.

In the result, it is ordered that;-

1. The application be and is hereby dismissed
2. Each party shall bear its own costs.

Mutungura & Partners, appellant's legal practitioners
Wintertons, applicant's legal practitioners