

COMMERCIAL BANK OF ZIMBABWE
versus
FARAI NYONI

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 9 September and 17 September 2014

Opposed Application

C. Warara, for the applicant
E. Dondo, for the respondent

MATHONSI J: After hearing arguments in this matter I granted the order for execution pending appeal in terms of the draft order filed by the applicant and said the reasons for doing so would follow. These are they.

An unrepentant and shameless beneficiary of a crime has strated among us for over nine years fighting tenaciously in these courts to retain the ill-gotten proceeds of a crime, 2 princely properties situated at Stand Number 2407 Prospect Township of Stand 2900 Prospect Township also known as Number 1925 Mainway Meadows, Prospect, Waterfalls, Harare and Stand Number 583 Marimba Park Township also known as 583 Mukonono Street, Marimba Park, Mufakose, Harare. He had done this, even after he confessed to having pilfered money during the time he was employed by the applicant as a manager at the applicant's head office about December 2004 and used the money to purchase the 2 properties I have described above.

When the fear of incarceration for his misdeeds was still upon him, he had readily consented to a judgment granted by PATEL J (as he then was) on 28 January 2014, to wit:

“IT IS ORDERED BY CONSENT THAT:

1. The 1st respondent (the respondent herein) shall pay the applicant restitution of all the money prejudiced the applicant (the applicant herein) after disposal of the properties listed below namely:

- (a) Stand No. 2407 Prospect Township of Stand 2900 Prospect Township also known as Stand 2407 Mainway Meadows, Waterfalls.
 - (b) Stand No. 583 Marimba Park Township also known as Stand 583 Mukonono Street, Marimba Park, Mufakose.
2. The disposal of the properties shall be done by Mr A.A. Musunga of Musunga & Associates Legal Practitioners who shall give the applicant letters undertaking to pay the amount recovered in the sale of each property before the caveats on the two properties are uplifted and transfer effected.
 3. The 1st respondent shall pay the costs of this application including any costs of uplifting the caveats.”

The bank, which is the applicant in this matter, abandoned the prosecution of the employee, who is the respondent herein, on the strength of the consent order, clearly a sign of goodwill as it did not have to. It was soon to receive a slap in the face for that as the respondent approached this court seeking to have the judgment granted by consent rescinded. This court, per HUNGWE J, had no kind words for the respondent when dismissing that application in HC 2925/05. It concluded:

“Quite clearly the plaintiff (the respondent herein) is a liar. He coaxed his younger brother to join in his scheme to deny what he knows to be the truth for obvious reasons. As Mr *Uriri* pointed out to him, he gave Mr Musunga the instructions at a time when the fear of imprisonment gripped him. He had been released on bail. He needed his liberty. Now that he feels the pressures are off he is trying his luck to retain his ill-gotten wealth by lying that he never mandated his legal practitioner to consent to the sale of the property.”

The respondent took his fight to the Supreme Court challenging the judgment of HUNGWE J and lost but still did not comply with the consent order. The applicant was forced to return to this court in HC 12 992/12 seeking to enforce the consent order. On 28 November 2013 this court, per MTSIYA J, issued an order holding the respondent in contempt of court for his disdain of the consent order. He suspended a 6 months imprisonment sentence on condition of compliance.

The respondent would have none of it. He escalated his “war effort” by noting an appeal to the Supreme Court against the contempt order compelling him to comply. In his

notice of appeal the thrust of his challenge is that he complied with the consent order by tendering payment in Zimbabwe Dollars in July 2010 long after that currency became moribund. He also took issue with the fact that the applicant could be said to be entitled to all the proceeds of the sale of the properties, when this court did not make an order to that effect.

The applicant then made this application seeking an order to execute pending appeal on the basis that the appeal is extremely without merit, and is not a genuine one it having been actuated by an unwavering desire to defy the consent order granted more than 9 years ago. The respondent opposed the application on the basis that his appeal is meritable given that he tendered payment in Zimbabwe dollars which the applicant rejected. He also said something to the effect that he developed the properties after they were purchased, without even suggesting what form that development took. In his view, if the properties were to be sold, the applicant would be unjustly enriched.

What the court must have regard to in determining whether to grant leave to execute pending appeal was summarised by MAKARAU JP (as she then was) in *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho* HH 39/07 (unreported). It is:

1. The appellant's absolute right to appeal and to test the correctness of the decision of the lower court before being called upon to satisfy the judgment appealed against.
2. The execution before the determination of the appeal negates the absolute right.
3. Where the appellant brings an appeal with no *bona fide* intention of testing the correctness of the decision, but motivated by a desire to buy time or harass the successful party, the court may allow execution pending appeal.
4. In exercising its discretion, the court has regards to the considerations stated by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545 namely:
 - (a) the potential of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were granted.

- (b) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused.
- (c) the prospects of success on appeal, including the question of whether the appeal is frivolous or vexatious.
- (d) where there is potentiality of irreparable harm or prejudice to both, the balance of hardship or convenience, as the case may be.

See also *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 155; *Marume v Gwarada & Ors* HH 92/13.

In the present case the respondent wants the apex court to determine whether he has complied with the consent order as not to be held to be in contempt of court. The compliance he talks about is a tender of \$500 million in Zimbabwe dollars at a time when that currency had ceased to be functional. Surely if that is not an abuse of the right of appeal nothing is. There can be no doubt that the respondent is playing games with the courts in his stubborn refusal to return ill-gotten wealth. He cannot be allowed to use the courts in a scheme to protect criminally obtained wealth at the expense of the applicant.

I have no doubt in my mind that the appeal has very little, if any, prospects of success. This is a person who consented to an order which he now refuses to abide by. He tried to reverse the consent order and failed. He has been to the Supreme Court on that and came back empty handed. He now wants to return to that court with a self-righteous but ill-conceived argument that he should be taken to have complied by tendering paper money.

The applicant has made a case for the relief sought. Accordingly, I make the following order, that:-

1. The applicant be and is hereby allowed to execute this court's order granted on 28 November 2013 in HC 12992/12 pending the appeal filed by the respondent in Case Number SC 518/13.
2. The respondent shall pay the costs of this application on a legal practitioner and client scale.

Warara & Associates, Applicant's Legal Practitioners
Pundu & Company, Respondent's Legal Practitioners