DR IGNATIUS CHOMBO
versus
MARIAN CHOMBO (nee MHLOYI)

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 15 July and 9 November 2016

Opposed application

E Samkange, for the applicant
Mrs *B Mtetwa*, for the respondent

MAKONI J: The applicant approaches this court seeking an order for execution of a judgment rendered by this court, pending appeal.

The background to the matter is that on the 31st August 2012 an order by consent, divorcing the parties, was granted by this court. The only issue that remained outstanding was the proprietary rights of the parties in relation to a farm called Allan Grange Farm (the farm).

The clause in the Consent Order that in relevant to the determination of this matter is Clause 8 which provides

> "8. It is recorded that the paragraphs 3,4 and 5 do not reflect a final settlement of the proprietary consequences of the marriage and to that end the parties agree as follows:-
>
> 8.1 Defendant shall be entitled to remain in occupation of that portion of Allan Grange Farm ("the Farm") for a period of 9 months from the date hereof, and shall during that period investigate such alternatives as may be available to her.
>
> 8.2 If the parties have not settled their differences in relation to the Farm, then at the expiry of the said period of 9 months either party shall be entitled to apply to the Registrar of this Honourable Court for this matter to be tried on the issue set out in paragraph 8.3 hereof
>
> 8.3 The issues for trial shall be:-
> - Whether defendant is entitled to any rights in respect of the Farm
> - What constitutes a fair and equitable distribution of the rights held by the parties in regard to the Farm.
>
> 8.4 Pending the final determination of the issues in paragraph 8.1 and 8.3 hereof, defendant shall be entitled to remain in occupation as of that portion of the Farm currently occupied by her.

9. Each party shall party pay its own costs to date."

By the expiry of the 9 months referred to in Clause 8.2, the parties had not settled their differences. The applicant then applied for set down of the matter and the matter was heard and determined by MANGOTA J on 27 July 2014.

The operative clause of the judgment reads as follows

"Judgment is accordingly, entered for the plaintiff with costs."

The respondent appealed against whole judgment to the Supreme Court on 9 July 2014. The appeal is still pending.

The grounds of appeal are as follows:

"1. The learned judged in failing to consider and take into account that the Appellant's rights to the farm were acquired during the marriage and that not having been dealt with a divorce by agreement were capable of being dealt with thereafter in terms of section 7 (1) of the Matrimonial Causes Act Chapter 5:13.

2. Having found that the parties operated the farm jointly, the learned Judge erred in disregarding the Appellant's admitted contributions in the joint venture and in giving the parties entire rights in the farm to the respondent.

3. Having found that the Appellant was a serious farmer, the learned judge a quo erred and misdirected himself when he failed to redress historical gender imbalanced in the allocation of resources by declaring the lease the Appellant's as envisaged under sections 3 (1) (f) and (g), 3 (2) (g), (i) (iii), 13 (3), 14 (1) and (2), 17 (1) and (c) 17 (2), 26 (c), 56, 67, 72 and 80 of the Constitution of Zimbabwe.

4. The learned Judge erred in holding that the farm and the 99 year lease did not form part of the "assets" subject to division in terms of section 7 (1) of the Matrimonial Causes Act, [*Chapter 5:13*].

5. Having found that the Appellant was a co-lessee of the farm when the lease was executed, the court *a quo* erred in holding that Appellant ceased being a co-lessee upon the granting of the divorce order.

6. The learned Judge *a quo* grossly erred and misdirected himself when he held that the Constitution of Zimbabwe did not place a duty on the courts to redress historical gender imbalances in the allocation of land.

7. In finding as he did, the learned Judger a quo breached the Appellant's rights as set out in the Sections of the Constitution referred to in paragraph (3) here above.

8. The learned Judge erred in holding that the issue of the farm was not properly before him when the parties had squarely placed the issue before him for determination in terms of the Matrimonial Causes Act.

9. The learned Judge *a quo* erred and misdirected himself when he wholly ignored the provisions of Section 7 (1) of the matrimonial Causes Act and the Appellant's evidence of why it would be fair and equitable to wholly transfer the farm lease to her.
10. The learned Judge erred when he ignored the Appellant's evidence, submissions and the factors a court is obliged to take into account in terms of s 7 (4) of the Matrimonial Causes Act.

11. Having held that the farm lease was outside the court's jurisdiction, the learned Judge further erred and contradicted himself when he declared that the respondent was entitled to the farm to the exclusion of the Appellant.

12. The learned Judge incorrectly exercised his discretion when he awarded costs against the Appellant.

The appellant will pay that the appeal be allowed with costs and that the judgment of the High Court be set aside and substituted as follows:

a) That the lease agreement in respects of Allan Grange Farm, being State land measuring 3,098,315 hectares and as depicted in survey diagram SG 6157/56, signed on the 15th May, 2007, be and is hereby wholly transferred to Marian Chombo (nee Mhloyi).
b) That the Minister of Lands and Rural Resettlement execute all documents necessary to transfer the lease agreement in respect of the farm to the said Marian Chombo."

The present application seeks to execute the judgment by MANGOTA J. The basis for seeking the relief sought is that it is more than two years since the appeal was filed and it has not been finalised. The noting of the appeal was not *bone fide* but done with the intention to frustrate the judgment.

It was also averred that there were absolutely no prospects of success in respect the respondent's appeal.

The respondent, on the other hand avers that it is not in dispute that the appeal has not been finalised because the court has lost the file or pleadings in the file have disappeared.

She also avers that the Consent Order that referred the issue of the farm to trial specifically provides that pending the final determination of the issue, she will have the right to remain on the farm. The Consent Order has not been set aside.

She also averred that the appeal enjoys prospects of success in view of the contradictory positions adapted by the applicant which were accepted by the court.

What the court should consider in dealing with applications of this nature was clearly spelt out by CHIDYAUSIKU CJ in *Zimbabwe Mining Devlopment Corp & Anor* v *African Consol Resources P/L & Ors* 2010 (2) ZLR 34 (S) at 37E-38F wherein he stated

"The law on the effect of the noting of an appeal against a judgment is well settled. At common law the noting of an appeal against a judgment suspends the operation of that

judgment. It is also trite that a common law the court granting the judgment enjoys inherent jurisdiction to order the execution of that judgment despite the noting of an appeal. In the leading case of *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) Corbett Ja at pp 544-546 had this to say:

> "Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd* v Estate Marks and Anor 1961 (2) SA 118 (T) at 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave the court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application. (See generally Olifants Tin 'B' Syndicate v de Jager 1912 AD 377 at p 481; *Reid and Anor* v Goart and Anor 1938 AD 511 at p 513; *Gentiruco AG* v Firestone SA (Pty) Ltd 1972 (1) SA (A) at 667; *Standard Bank of SA (Pty) Ltd* v Stama (Pty) Ltd 1975 (1) SA 730 (A) at 746). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (Reid's case supra at 513). The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave to be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet 49.73; *Ruby's Cash Store (Pty) Ltd* v *Estate Marks and Anor supra* at 127). This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (cf *Fismer* v *Thorton* 1929 AD 17 at 19). In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstance, and, in doing so, would normally have regard, *inter alia*, to the following factors:
>
> (1) The potentially of irreparable harm or prejudice being sustained by the appellant on appeal (the respondent in the application) if leave to execute were to be granted;
> (2) The potentially of irreparable harm or prejudice being sustained by the respondent on appeal (the 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 [the] appellant and [the] respondent, the balance of hardship or convenience, as the case may be.

(See in this connection Ruby's case supra at pp 127-8; also *Rood* v *Wallach* 1904 TS at 259; *Weber* v *Spira* 1912 TPD 331 at 333-4; *Rand Daily Mails Ltd* v *Johnston* 1928 WLD 85; *Frankel* v *Pirie* 1936 EDl 106 at 114-6; *Leask* v *French and Ors* 1949 (4) Sa 887 (c) at 892-4; *Ismail* v *Keshavjee* 1957 (1) SA 684 (T) at 688-9; *Du Plessis* v *van der Merwe* 1960 (2) SA 319 (O). Although most of the cases just cited dealt with the exercise of the court's discretion under a statutory provision or rule of court, the statute or rule concerned did not prescribe the nature of the discretion except in broad general terms (e.g ss 36 and 39 of Proc. 14 of 1902 (T) empower the court to give directions as

> 'may in each case appear to be most consistent with real and substantial justice')

> And the same general approach would be appropriate to the exercise of a discretion under the aforementioned rule of practice"

Before considering the above factors I would want to consider aspects which are peculiar to this matter. Clause 8.4 bestowed on the respondent the right to remain in occupation pending the final determination of the matter. The respondent raised this issue in para 2.3 of her Notice of Opposition. In the applicant's Answering Affidavit, he did not comment on that aspect. Neither was it addressed in applicant's Heads of Argument or in oral submissions.

It is not in dispute that the Consent Order, which contains Clause 8.4, is extant and has not been set aside. The applicant has not made an application to have para 8.4 expunged from the order. He had not sought to put forward an interpretation of the Clause that is different from that of the respondent. His deafening silence on the issue, in his papers is telling, despite that it was raised in the respondent's papers. What comes out clearly is that the applicant cannot seek an order which contradicts the provisions of the order that he consented to without first setting aside the provisions of the Consent Order.

The general rule regarding orders and judgments of court is enunciated by the learned authors Herbestein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa* 5th Ed at p926 as follows

> "The general principle now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases."

This is particularly so with consent orders. The position regarding such orders was made very clear in *Commissioner of Police* v *Commercial Farmers Union* 2000 (1) ZLR 503 H at 524 A where the court stated the following in relation to the setting aside of consent orders

> "Under common law, the position with regard to judgments by consent is even more circumscribed with respect to whether such judgments can be revoked or withdrawn. The applicant has not only failed to lay the basis for the relief he seeks under commons law, but has also failed to satisfy me that this would be an appropriate case to grant such relief."

Although the court has a discretion whether or not to grant leave *in casu* its hands are tied by the Consent Order.

The applicant has therefore failed to lay a basis for the relief that he seeks in view of the extant Consent Order.

Assuming I am wrong I will go on to consider the other peculiar feature of this matter.

It is common cause that the divorce file went missing. It is also common cause that both parties have changed legal practitioners during the course of the matter. When Mr *Samkange* came on the scene, he assisted, from the files that were handed over to him, with the reconstruction of the record. I must commend him for his efforts in the process of the reconstruction of the record. As at this stage, there is one pleading missing from the divorce file and that is the respondent's (defendant's) plea. All efforts to locate it have failed. As a result there has been a delay in the prosecution of the appeal.

What is clear from the above is that the delay in the prosecution of the appeal is not and cannot be attributed to either party. The record or pleadings went missing in the hands of court officials. This is what has stalled progress in the matter. By granting an order for execution pending appeal on the basis of delay, the court will be punishing the respondent for a delay which has been occasioned through no fault on her part. If this were to be allowed surely justice will turn on its head.

I will now turn to the factors that the court has to consider in an application of this nature.

Irreparable Harm

The applicant avers that he will suffer irreparable harm if the status quo is maintained in that at divorce the parties were engaged in two main businesses, being trucking and farming. The respondent was awarded the trucking business and she has a means of living. He was left with the farming business and has not been able to make optimal use of the farm due to the respondent's presence.

On the other hand the respondent avers that she has been working on the farm, full time, since 2002. Being evicted would cause irreparable harm in that farming was her major source of livelihood. She would have to abandon the infrastructure she has developed on the farm and find storage for her equipment. She further avers that she has not interfered with the applicant's farming activities on his portion that he was awarded by the Consent Order and will suffer irreparable harm. The balance of convenience favours.

From the papers it appears the parties will suffer irreparable harm they maintain the demarcated and agreed occupation which they have done for some years now. In my view, that position should be maintained until the dispute has been finally determined.

Prospects of success

The appeal raises some very pertinent questions which in my view need to have their correctness or otherwise tested by the Supreme Court such as but not limited to:

(i) Whether the 99 year lease, granted in respect of land acquired by the Government, forms parts of the 'assets' of a matrimonial estate subject to division in terms of s 7 (1) of the Matrimonial Causes Act [*Chapter 5:13*].

(ii) What are the rights of a co-lessee to the 99 year lease and do these rights cease upon the granting of the divorce.

The respondent raises other points which in my view cannot be regarded as frivolous and vexatious such as but not limited to

(i) the applicant having, placed the issue of the farm before the court to be considered for distribution in terms of the Matrimonial Causes Act, the court on one had found that it had no jurisdiction to determine who should retain the farm as it was in the exclusive purview of the Ministry of Lands. On the other hand the court proceeded to award the farm to the applicant

(ii) the finding by the court that at the time of the trial the respondent had ceased to be a spouse of the applicant in August 2012 and yet the issue had been referred to trial by consent of the parties for determination of their rights in terms of the Matrimonial Causes Act [*Chapter 5:13*].

(iii) whether the Constitution of Zimbabwe placed a duty on the courts to redress historical gender imbalances in the allocation of land.

From the above, it is clear that the appeal filed by the respondent is not frivolous or vexatious but rather enjoys high prospects of succees. The applicant has therefore failed to discharge the onus on him that he is entitled to the relief that he seeks.

In the result I will make the following order.

1) The application is dismissed.
2) The applicant to pay respondent's costs.

Venturas & Samukange, applicant's legal practitioners
Messrs Mtetwa & Nyambirai, respondent's legal practitioners