SOLOMON SIGAUKE
versus
INNOCENT PARADZAI MAKWIRAMITI

IN THE HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14, 19 March 2018 and 28 March 2018

Opposed Application

T Militao, for the applicant
M. Kamdefwere, for the respondent

MUREMBA J: The facts of the present matter are as follows. The respondent is the former owner of the immovable property which is at the centre of the dispute between the parties. The property is known as stand no. 102 Logan Park of Lot 6A, Hatfield, Harare. Pursuant to a writ of execution issued against this property, the applicant bought the property in a judicial sale conducted by the Sheriff of Zimbabwe. The applicant subsequently had title of the property transferred into his name. Despite this, the respondent refused to vacate the property. This resulted in the applicant suing the respondent for his eviction in case number HC 8193/14. In turn the respondent counter-sued the applicant in case number HC 8866/14 challenging the sale in execution and seeking cancellation of transfer of title. The two matters were consolidated resulting in me hearing the two matters together. After hearing the two matters, I gave judgment on 26 July 2017 dismissing the respondent's claim for cancellation of the sale and transfer of the property to the applicant. I granted an order for the eviction of the respondent and all those claiming occupation through him from the property. Dissatisfied with the judgment, the respondent noted an appeal in the Supreme Court and the appeal is still pending. The applicant is now seeking leave to execute the judgment appealed against pending the appeal as the noting of the appeal suspended the operation of the judgment.

At the beginning of the hearing the respondent applied that I recuse myself in the matter alleging fears that I would be biased in the determination of this matter. Mr. *Kamdefwere* submitted that the respondent had a reasonable apprehension of fear that I may be swayed by my prior findings of fact against him in determining whether or not he has prospects of success on appeal. He further submitted that I already have a predisposed mind set to even consider that the respondent has any prospects of success on appeal. He submitted that it was only fair for me to refer the matter to a different judge. The applicant opposed the application arguing that the mere fact that the respondent is afraid that the court may confirm its earlier position does not constitute reasonable apprehension of bias because the court always gives reasons for its judgment. Mr. *Militao* submitted that it is the duty of the respondent to point out to the court where it went wrong and make the court change its mind.

After hearing argument l dismissed the application for recusal for the reason that the grounds upon which recusal was requested did not in my view give rise to a reasonable apprehension of bias. In *Mahlangu v Dowa & Ors* HH 4/11 Chatukuta J said,

> "The test to be adopted in determining whether or not a judicial officer should recuse him or herself is well settled and is set out in *Leopard Rock Hotel Co. (Pvt) Ltd & Anor v Wallenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). The test is a two-fold objective test (double reasonableness) that the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case"

She went on to say,

> "The test is in my view aptly stated in *President of The Republic of South Africa and Others v South African Rugby Football Union and Others* (supra, at 177D-E, para 48) where it was held that:
> 'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are

> reasonable grounds on the part of litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'"

As was correctly submitted by Mr. *Militao* the mere fact that the respondent is afraid that the court may confirm its earlier finding or position does not constitute reasonable apprehension of bias. In an application of this nature there are elements that I have to consider in the exercise of my discretion on whether or not to grant leave to the applicant to execute judgment pending appeal. I have to exercise the discretion judiciously and impartially irrespective of the fact that I am the one who granted the judgment which is now being appealed against. I am alive to the fact that I should disabuse my mind of any predispositions and keep it open to persuasion by submissions by both counsels. Other than having the fear that I might not be persuaded to find that the respondent has prospects of success on appeal, the respondent had no other basis for believing that I might be biased against him. I do not believe that this kind of apprehension is enough for me to recuse myself, otherwise this will simply mean that every judge will have to recuse themselves in an application of this nature or in applications for leave to appeal to the Supreme Court. It is for these reasons that l dismissed the application for recusal.

Coming to the merits of the application, it is the applicant's averment that the appeal by the respondent is frivolous and vexatious and was noted not with the *bona fide* intention of seeking to reverse the judgment of this court but to gain time and to harass him. He avers that the respondent has no prospects of success on appeal because in arriving at its judgment this court had properly weighed and analysed all the evidence that was led at trial. The applicant further avers that if the application is not granted he stands to suffer irreparable harm because he has been spending money on rented accommodation since 2012 when he bought the property in issue. In addition to that he avers that he is the one who has been paying rates for the property from the time he got title to the property 3 years ago. The applicant further avers that being the title holder of the property he is entitled to occupy the property. He avers that he stands to suffer more prejudice in the circumstances of this case.

It is the respondent's averment that the appeal was not filed as a delaying tactic or as an attempt to abuse court process or to harass the applicant. He avers that he filed it with a *bona fide* intention to have the judgment reversed. He avers that if the application for leave to execute is

granted he will suffer irreparable harm in that this property has been his family home and residence since 1993 and his family has known no other home. His children have attended school and have friends in Hatfield. He avers that the status *quo ante* should be maintained until the appeal is heard to avoid a painful and inconvenient change to his family. He avers that the applicant should continue staying in rented accommodation as he has always been doing. The respondent avers that the balance of hardship favours him as the applicant already has a roof over his head. The respondent avers that the applicant has already filed a claim for rentals and holding over damages against him under HC 1836/17 and the matter is pending in this court. The respondent avers that any prejudice to the applicant is already cured by this claim. He avers that he and his family will be rendered homeless if the applicant is allowed to execute pending appeal.

Further, it is the respondent's averment that he has good prospects of success on appeal. He makes reference to his grounds of appeal as captured in the notice of appeal. The grounds of appeal show that the respondent is appealing against this court's findings on issues of fact. In short he avers that this court limited its analysis of facts to the pleadings and omitted to analyse the evidence that was led during trial. He avers that this led the court to make wrong findings of fact in relation to the innocence of the applicant in the whole sale transaction. The respondent further avers that this error caused this court to wrongly conclude that there were no irregularities or *mala fides* on the part of the Sheriff and the applicant in the way the confirmation of the sale was conducted. He avers that this court erred by disregarding the expert evidence of Dr. Mangezi which was to the effect that Piniel Matizanadzo the legal practitioner who was representing him (the respondent) during confirmation proceedings was of unsound mind. The respondent also avers that this court wrongly concluded that the respondent did not lead evidence which alleged fraud, bad faith and knowledge of prior irregularities on the part of the applicant. The respondent also avers that this court wrongly concluded that he had been involved in the whole litigation process just to buy time and play dilatory tactics thereby awarding against him costs on a higher scale.

In an application of this nature the court considers the principles set down by CORBERT JA in the case of *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at page 545. He said,

> "The court to which application for leave to execute is made has a wide discretion to grant or refuse to grant and if leave be granted, to determine the conditions upon which the right to execute shall be exercised. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. 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, inter alia, to the following factors:
> 1. The potentiality of irreparable harm or prejudice being sustained by the appellant (respondent in the application) if leave were granted;
> 2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to appeal 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 for some indirect purpose e.g. to gain time or to harass the other party;
> 4. Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

See also the case of *Econet (Pvt) Ltd* v *Telecel (Zimbabwe) Pvt Ltd* 1998 (1) ZLR 149 (H) and *Arches (Pvt) Ltd* v *Guthrie Holdings* 1989 (1) ZLR 149 (H).

It is common cause that this case involves occupation of property which both parties are fighting over. Either one party is in occupation of the property and not paying rentals or he is out of occupation of the property and paying rentals in rented accommodation. Neither of the two parties wants to be out of occupation and paying rentals because that prejudices them financially. The first question is with this scenario who between the two is likely to suffer irreparable harm? The second question is does the respondent have prospects of success on appeal?

After weighing the averments made by the parties and the arguments made by their counsels, I am persuaded to grant the applicant's application for leave to execute pending appeal. It is my considered view that it is just and equitable in the circumstances of this matter to grant such leave. Although the respondent used to be the owner of the property, the fact of the matter is that he is no longer the owner thereof. A judgment sounding in money was granted against him on 29 June 2011 in HC 4245/11. He did not satisfy that judgment resulting in his immovable property being sold in execution to the applicant in 2012. Thereafter the applicant obtained title to the property and this happened about 3 years ago. As things stand it is the applicant who is the

registered owner of the property, yet besides this position he continues to incur rental expenses as he continues to live in rented accommodation whilst the respondent continues to live at the property he no longer holds title to. Besides, the respondent is not paying any rentals and neither is he paying the rates for this property. It is the applicant who is paying the rates for the property from the time he got title to the property about 3 years ago. It is a fact that the applicant has suffered heavy financial prejudice from the time he bought this property 5 years ago. He paid the purchase price which money was used to pay for the respondent's judgment debt. The flip side of the matter is that the respondent has had his debt paid for him by the applicant and it has been 5 years now. At the same time he continues to enjoy free accommodation with no financial expenses at all. He does not pay rent and he does not pay rates.

It is my considered view that between the two it is the applicant who is likely to suffer irreparable harm. As I have already indicated above, he has already lost money by paying the purchase prize in purchasing the property which money was used to pay the respondent's debt. For 5 years he has been paying rentals elsewhere. He is even paying rates for the property which continues to be occupied by the respondent. That he has since sued for rentals and holding over damages from the respondent is not a cure for his financial loss. Chances that he might not recover anything from the respondent are very high. The respondent is the same person who failed to pay his debt resulting in the same property being sold to the applicant 5 years ago. The respondent makes it clear that he will suffer hardship by living in rented accommodation. This shows that the respondent has severe financial challenges. It is therefore highly unlikely that the respondent will be able to make good the applicant's financial losses even if the applicant succeeds in his claim for rentals and holding over damages. There is therefore potential irreparable to the applicant harm if leave to execute is not granted pending appeal. That the respondent and his family will be rendered homeless and that his family has not known any other home other than this property since 1993 does not constitute potential irreparable harm to him. He can also live in rented accommodation as the applicant and his family have been doing for the past 5 years. In the unlikely event that the respondent succeeds on appeal, restoring the status *quo ante* will not be difficult. All that will be needed is for him to take occupation of the property and for the applicant to move out.

I do not believe that the respondent has prospects of success on appeal. This is because the respondent's main argument in the notice of appeal is that this court did not consider the evidence that was led at trial in arriving at its judgment. The respondent argues that had this court considered the actual evidence led at trial it would have arrived at a different conclusion with regards to his claim for the cancellation of the sale and cancellation of the transfer of title. I am not persuaded by this argument because in my judgment I made it clear that I was not going to repeat writing the evidence that was led at trial because it was simply a repeat of the averments that the parties made in their pleadings. In other words, if I had gone on to write the evidence that was led at trial, I would have simply repeated the contents of the pleadings because the pleadings and the evidence were not different. The evidence that was led by the parties during trial is a simple regurgitation of the averments made in the pleadings. I therefore did not see the benefit of writing what the parties said in evidence. If I made wrong conclusions or findings of facts it is not because I did not consider the evidence that was led at trial. My judgment was based on an analysis of the evidence the parties led. Attempting to have the judgment set aside on the basis that I did not analyse the evidence which was led makes the matter carry little prospects of success on appeal because I made it clear in my judgment why I was not repeating the evidence that was led by the parties. For this reason it cannot be said that I misdirected myself.

The evidence on record makes it clear that the respondent did not adduce any evidence which proved or showed that the applicant acted fraudulently or acted in bad faith or that he had any knowledge of prior irregularities when he participated in the sale. There was therefore no misdirection on my part in the way I analysed the evidence.

Considering the way the respondent has been handling this matter from the time the property was sold, I am convinced that the appeal was noted as a delaying tactic, just to buy time by the respondent who does not want to vacate the property. From the time the sale of the property was confirmed by the sheriff, the respondent filed several court applications challenging the sale. Some of the applications were withdrawn and some were never prosecuted. After the trial had been concluded the respondent delayed in filing his closing submissions. I ended up writing the judgment without them. However, as soon as judgment was granted against him, he noted an appeal because he knew that this had the effect of suspending the operation of the judgment. He

knew that this was to his advantage as he would not have to vacate the property. When the present application for leave to execute was filed, he made an application for this court to recuse itself. All these were delaying tactics, just to delay the day of reckoning, which is the day he should vacate the property. The respondent, as he clearly alludes to it in his opposing affidavit, does not want to be rendered homeless as he has no other immovable property to move to. His appeal was thus noted just to gain time. He wants to remain at the property for as long as he can.

In view of the foregoing, it be and is hereby ordered that:

1. The applicant is granted leave to execute judgment of this court in Case No. HC 8193/14 pending appeal in Case No. SC 557/17.
2. The respondent shall pay costs of suit.

Kwenda and Chagwiza, applicant's legal practitioners
Muringi, Kamdefwere, respondent's legal practitioners