

COMMON VISION HOUSING CONSORTIUM
versus
JOHANE MARANGE APOSTOLIC CHURCH
and
CITY OF HARARE
and
THE DIRECTOR OF HOUSING & COMMUNITY SERVICES
CITY OF HARARE
and
CITY OF HARARE TOWN CLERK
and
THE DIRECTOR OF URBAN PLANNING SERVICES
and
THE MINISTER OF LOCAL GOVERNMENT PUBLIC
WORKS AND NATIONAL HOUSING
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 30 January 2018 & 28 February 2019

Opposed Matter

B Sadovera, for the applicant
A Muchandiona, for the respondents

ZHOU J: This is an application for leave to execute the judgment of this court which was granted in case no. HC 11845/16 pending determination of the appeal noted against it. The judgment was granted on 25 July 2018. On 7 August 2018 the first respondent noted an appeal against part of the judgment. The instant application is opposed by the first respondent.

In case no. HC 11845/16 the applicant was granted an order in the following terms:

“1) It is declared that the allocation and sale of stands 19751-19793 Budiriro Township to the

applicant's member cooperatives by the first respondent is legally binding.

- 2) The first, second, third and fourth respondents be and are hereby ordered not to reallocate stands 19751-19793 to any person other than applicant's member cooperatives.
- 3) The sixth respondent be and is hereby ordered to demolish the brick and mortar wall erected encroaching over the applicant's member cooperatives stands ranging from number 19750-19753 Budiro Township and held under General Plan number TPX 1349/1 Budiro 5, Harare within 7 days of being served with this order.
- 4) In the event that the sixth respondent fails, neglects and / or refuses to comply with the terms of clause (3) of this order, the first respondent through its department of Local Planning Services with the assistance of the Deputy Sheriff Harare and the members of the Zimbabwe Republic Police be and are hereby authorised to demolish the brick and mortar wall erected by the sixth respondent over a block of stands allocated and sold to the applicant's member cooperatives being stands 19750 – 19793 Budiro Township and held under plan number TPX 1349/1, Budiro 5, Harare.
- 5) In the event that the sixth respondent fails, neglects and or refuses to comply with terms of para (3) of this order and the demolition is done in terms of para (4) of the order, the 6th respondent be and is hereby ordered to pay all costs incurred by the first respondent in carrying out the demolition in terms of para (4).
- 6) The sixth respondent pays the costs of suit.”

The first respondent herein was the sixth respondent in case no. HC 11845/16. The first respondent's appeal is directed only at the portion of the order directing it to demolish the brick and mortar wall which it erected at a piece of land which it occupies which wall was found to encroach on stands which were allocated to the applicant by the local authority.

The principles which apply to an application for leave to execute a judgment which is the subject of a pending appeal are settled in this jurisdiction. In the case of *Masimbe v Masimbe* 1995 (2) ZLR 31 (S) at 36F-37B the Supreme Court cited with approval the following passage from the case of *South Cape Corp (Pty) Ltd v Eng Management Services (Pty) Ltd* 1977 (3) SA 534 (A):

“The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave... 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 on appeal, if leave to execute were granted;
- 2) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal, (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 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 appellant and respondent, the balance of hardship or convenience, as the case may be.”

The question of prospects of success addresses prospects of success not in the sense that the appeal will or should succeed, but the inquiry is directed at whether the appeal has substance. Put in other words, if the notice of appeal raises matters which make the appeal arguable and not present it as a predictable failure or, to use the words from the passage cited above, one which is “frivolous or vexatious” or “has been noted for some indirect purpose,” then such an appeal would have prospects of success for the purposes of forestalling the granting of leave to execute pending appeal.

In *casu*, while the court did find as a fact that the wall in question encroaches onto land allocated to the applicant’s members, that finding is being challenged in grounds 1 and 2 of the notice of appeal. Bearing in mind that the proceedings were instituted by way of court application, some evidence, especially from the local authority, would have conclusively resolved the factual issue. But there are conflicting positions from the local authority which are apparent from the papers filed of record. In a letter written by the Director of Works of the City of Harare dated 1 December 2015 it is stated that the wall indeed encroached onto the applicant’s stand. But there is another letter dated 9 November 2016 written by the City of Harare’s Budiro District Officer in which there is a plea to the first respondent to accommodate the applicant’s members on its complex which presumably, includes the disputed piece of land. On these grounds alone, I would say that the appeal has prospects of success in that, it raises matters which are arguable. Whether the first respondent will ultimately succeed is not a matter for this court at this juncture.

In respect of prejudice, there is no doubt that the applicant is being prejudiced by any delay in having free and uninterrupted access to the stands allocated to its members if indeed those fall within the area covered by the wall. However, that prejudice is not irreparable. It is prejudice that has been in existence since the wall was erected. There is nothing to suggest that the delay between now and the hearing of the appeal would make it irreparable. If the appeal fails the applicant’s members will have their unrestricted access to the land. On the other hand, if execution proceeds and the wall is demolished, that situation would be more complicated to repair in that it will involve having to demand reconstruction of the demolished wall. Weighing these potential prejudices

against one another. I would conclude that the balance of convenience favours that execution remains suspended pending determination of the appeal.

In the light of the above facts as considered, and in all the circumstances of this case, the application for leave to execute pending appeal cannot succeed.

I have agonized over the question of costs. This is an interlocutory application in the sense that the relief is being sought pending determination of an appeal. The two parties have been placed in this predicament by a third party, the City of Harare, which has not put the correct factual position regarding the location of the applicant's stands in relation to the first respondent's wall. It elected to abide by the decision of the court in both the main application and this application. The application in casu is not groundless, especially given the fact that the first respondent has not based its opposition in both cases on any claim of title other than the fact that it has been in occupation of the land for 4 decades. For these reasons, it seems to me to be fair that there be an order that each party bears its own costs in this matter.

In the result, the application is dismissed with each party bearing its own costs.

Tadiwa and Associates, applicant's legal practitioners

Danziger & Partners, 1st respondent's legal practitioners

Mbidzo Muchadehama & Makoni, 2nd – 5th respondent's legal practitioners

Civil Division of the Attorney General's Office, 6th respondent's legal practitioners