NORWICH TRADING (PVT) LTD
versus
ASTRODORNE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 26 April 2021 and 14 October 2022

Urgent Chamber Application
(Leave to execute pending appeal)

Adv *W Nyamakura* with *Mr M Mbuyisa,* for the applicant
Mr *C Kwirira,* for the respondent

CHINAMORA J:

Factual background

The applicant seeks leave to execute a judgment granted by this court on 9 April 2021 under HC 912/21 pending the hearing and determination of an appeal lodged by the respondent in the Supreme Court under SC 80/21. Essentially, the applicant was granted spoliation order which restored it to possession of No 750 Gaydon Road, Greystone Park Harare ("the property"), and also ordered the respondent and all those claiming through it to vacate the same property. The respondent's appeal suspended the judgment under HC 912/21.

The salient facts of this case are that the applicant is the registered owner of the property under Deed of Transfer No 11896/98, which is marked Annexure "NT 3B" and is on pages 79-81 of the record. In 2011, there was an agreement of sale of shares in the applicant between one Nathan Mnaba and Mrs Nighert Savania. The applicant avers that Mr Mnaba did not pay the full purchase price, resulting in Mrs Savania cancelling the agreement of sale. Following that, the applicant and Mrs Savania instituted proceedings under HC 9654/13 to evict Mr Mnaba from the property, which relief was granted by MATHONSI J (as he then was) (Judgment HH 730-18). Mr Mnaba appealed to the Supreme Court under SC 874/18, but vacated the property despite the pendency of the appeal.

The applicant contends that when Mr Mnaba left, Mrs Savania was in occupation of the property. It added that it only knew the respondent in October 2019 when one Nyasha Muzavazi attempted to transfer the property to the respondent. To give a context, Mr Mnaba had appointed the said Muzavazi a director of the applicant via a Form CR 14, which was cancelled judgment in HC 9654/13. The relevant part reads:

> "The CR 14 form submitted by the defendant or his agent to the registrar of companies in respect of the directorship of the second plaintiff is hereby cancelled and the one that was in place immediately before that reflecting the first plaintiff and the late Mahendra-Kamar Jivan Savania as directors is restored".

Additionally, it was submitted that Mr Mnaba and Mr Muzavazi had used the cancelled Form CR 14 to fraudulently obtain a loan from Stanbic Bank secured by the property. As a result, the applicant alleges that it caused the Registrar of Deeds to endorse a caveat on the title.

The respondent raised a point in *limine* that the matter was not urgent. It was argued that the applicant had not averred or shown that irreparable harm would accrue if the relief sought was not granted. The respondent referred to the judgment of MATHONSI J (as he then was) which granted the applicant holding over damages (until it regains possession), and submitted that the applicant cannot suffer irreparable harm in those circumstances. Contrary to what the applicant says, the respondent argued that irreparable harm if leave to execute was granted, because the remedy of spoliation is final in nature. According to the respondent, the appeal will become an academic exercise even if it was the successful party. In respect of the merits, the respondent's case was that, Deen Mahemdra Jivan Savania had in an affidavit signed on 27 January 2016 confirmed that he consented to the sale of shares in the applicant to Mnaba. The affidavit is attached to the respondent's opposing affidavit marked Annexure "DM1". In addition, the respondent submitted that it was an innocent purchaser of the property, and had taken occupation pursuant to an agreement of sale signed on 21 March 2019 between it and the applicant. Reliance was placed on an order obtained by Stanbic Bank against the applicant under HC 2755/17 for loan arrears. Pursuant to the court order, the respondent stated that it bought the property by private treaty and paid the purchase price in full. The respondent said that the proceeds of the sale were used to settle the amount owed to Stanbic Bank. Its final argument was that it did not forcibly take possession of the property on 20 March 2021, but was given the keys as early as March 2019.

The respondent submitted that the appeal that it lodged under SC 80/21 has prospects of success. In particular, the respondent stressed that the court *a quo* erred in finding that the applicant was in peaceful and undisturbed possession of the property without any evidence to support that. Its position was that the applicant bore the onus to prove dispossession, and that the applicant had to establish a clear right as opposed to a *prima facie* right. Having looked at the facts of this matter, let me now examine the law on *mandament van spolie*

The applicable law

The law on leave to execute pending appeal is settled in this jurisdiction. In this respect, the requirements were summarised by MAKARAU JP (as she then was) in *Old Mutual Life Assurance Company (Pvt) Ltd* v *Makgatho* HH 39-07 as:

> "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 (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
> 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 prospect of success on appeal especially where the whole object of the appeal is defeated if execution were to proceed. (See *Wood N.O.* v *Edwards & Anor* 1966 RLR 335)."

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

The starting point is that the respondent has an absolute right of appeal, and the authorisation of execution pending appeal has the effect of denying the respondent the opportunity to test the correctness of the court *a quo*'s decision. I am of the view that the applicant should be afforded that opportunity. Allowing a lower court to determine whether a judgment should be enforced pending an appeal is a way of dealing with frivolous appeals. As stated in *Old Mutual Life Assurance Company (Private) Limited* v *L.Makgatho* HH 39-07:

> "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 to 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."

Analysis of the case

In light of the law on the subject, I will proceed to examine whether or not the facts support the grant of leave to execute pending appeal. It was argued that the applicant would not suffer any irreparable harm or prejudice as the judgement in HC 9654/13 had awarded holding over damages until such time as the respondent secures possession. The applicant argued that the respondent would not suffer any harm if the application was granted as the applicant was, in any event, not in occupation of the property after Mnaba left the property after noting an appeal under SC 874/18. As for prospects of success on the grounds of appeal, the respondent submitted that the court *a quo* granted *mandament van spolie* in circumstances where the applicant had neither proved that it was in peaceful and undisturbed possession nor that it was dispossessed without due process.

It further argued that the possession claimed by the applicant was highly disputed. The applicant argued that the court *a quo* had accepted that the applicant took possession of the property after the judgment of Justice MATHONSI was handed down. On the other hand, the respondent's position was that it took occupation when the keys to the property were handed to it in March 2019, and that it never gave up the possession. The applicant's affidavit states that Mnaba vacated the property on a date that it does not know, and that the property was found in a bad state in December 2018. What is clear is that Mnaba as an individual is the one who vacated the property, and that he left the property before it was sold to the respondent the following year in March 2019. Thus, it is evident that when Mnaba gave up possession in December 2018, he was not giving such possession up on behalf of the respondent who had not yet come into the picture. The respondent asserts that it took possession in March 2019.

I am of the view that the issue of whether or not the applicant had peaceful and undisturbed possession of the property gives the respondent good prospects of success on appeal. Since it is not clear that the applicant was in occupation at the time the respondent maintains that it had taken possession of the same property, the appellate court may well find that it was not proved that an act of spoliation took place. On the basis of prospects of success I intend to decline leave to execute pending appeal. Additionally, my view is that the balance of convenience favours the respondent, since as the applicant was awarded holding over damages till possession is regained, there is no demonstrable prejudice to it.

Taking into account all of the foregoing, I am satisfied that the applicant has failed to make a good case be granted leave to execute pending appeal. This is a matter which, in my view, requires that the respondent's right to test the correctness of the decision of the court a quo not be interfered with before the appeal is heard and determined. In the result, the application is dismissed. In the exercise of my discretion, I have decided that each party will bear its own costs.

Mtetwa and Nyambirai, applicant's legal practitioners
Magwaliba and Kwirira, respondent's legal practitioners