

MINISTER OF DEFENCE

Versus

RANGARIRAYI GUNDA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 8 FEBRUARY AND 8 MARCH 2012

I.C. Chihuri for applicant
J. P. Mutizwa for respondent

Opposed Application

KAMOCHA J: On 30 June 2011 this court made the following order:-

“It is ordered that:-

- 1) Respondent vacate the premises at number 14 Lawley Road, Suburbs, Bulawayo within 10 days of this order;
- 2) In the event that respondent refused to vacate the said premises within the period specified in (1) above the Deputy Sheriff of this court is hereby empowered to evict her; and
- 3) Respondent shall bear the costs of suit on a party and party scale.”

The respondent appealed to the Supreme Court against the above decision. The noting of an appeal automatically suspended the execution of the judgment of this court prompting the applicant to file this application seeking leave of the court to execute the judgment pending the appeal.

The factors that a court takes into account in determining whether or not to grant such leave were set out as follows by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 at 545.

“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 (respondent in the application) if leave to execute were to be granted;

2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
3. The prospects of success on appeal, including more particularly the question of 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 potentiality of irreparable harm or prejudice to both appellant and respondent, 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

The house at the centre of the dispute is known as number 14 Lawley Road, Suburbs, Bulawayo. It is listed at the Army Headquarters as one of the army’s “reserved houses”. That particular house is only reserved for any senior army officer who is appointed Commander 1 Brigade. The late husband of the respondent Brigadier General Paul Armstrong Gunda – “Gunda” and his family occupied the house from 2004 until 2007 when he passed on. He did so by virtue of being Commander 1 Brigade in Bulawayo.

The late Gunda passed away on 21 June 2007. In terms of the army regulations his wife and children had the right to remain in the house for a period of one month. Her right to lawfully occupy the house should have ended on 31 July 2007. There was, however, a long delay before she was given a notice to vacate the premises. The notice to vacate was given on 20 October 2008.

While the army has been criticized for the inordinate delay to give her notice to vacate the premises, that, in my view, did not confer her the right to occupy the premises after the prescribed period of one month.

It is common cause that the respondent is not employed by the army let alone being a senior army officer who is entitled to occupy such a house by virtue of being Commander 1 Brigade. She is occupying the house without any form of a lease.

She has no right whatsoever to occupy the house. Her contention was that her late husband had been promised by the army to buy the said property as a sitting tenant. She contended that certain army officers in similar ranks to her late husband had been offered to buy government houses they occupied as sitting tenants. There was a government policy which was in place for ten years – starting from 1993 until the disposal of government houses was suspended in 2003. The procedure for the disposal of government houses was that all such houses approved for disposal had to be valued by a government valuer. Thereafter an offer letter would be issued to the sitting tenant who would either accept or decline the offer. The

respondent did not claim that her late husband received an offer letter to purchase the house. It was on that basis that the court held as a fact that her late husband did not receive an offer in writing to buy the house as a sitting tenant. The court further held that in the absence of proof that her late husband was actually offered to buy the house her claim remained mere speculation and wishful thinking.

Respondent did suggest that she had witnesses including some from the army who were going to bear her out on the offer made to her husband to purchase the house. The suggestion is clearly without merit. Such offers are not made verbally. They are made by way of an offer letter. Moreover, she did not even name the witnesses and officers in the army who were going to support her story. Her story remains a bald and unsubstantiated assertion. The fact that some army officers of the rank of her late husband were offered houses they were occupying does not at all mean her late husband also received the offer.

In the light of the foregoing it seems to me that the respondent has no prospects of success on appeal. The appeal seems to have been noted just for the sake of buying time.

Further, the army is being prejudiced by the continued occupation of the house by the respondent. The current Commander 1 Brigade cannot use the house which he is meant to use because of the respondent who is still in occupation when she has no right to do so. She does so unlawfully. In the result no prejudice will be occasioned to her if leave to execute were to be granted.

Consequently the application for leave to execute pending appeal is hereby granted in the following terms:-

It is ordered that:-

1. Leave to execute the judgment of this court in case number HB-92-11 granted on 30 June 2011 pending appeal, be and is hereby granted; and
2. Respondent bears the costs of this application on a party and party scale.

*Civil Division of the Attorney-General's Office, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners respondent's legal practitioners*