HB 67/19
HC 1876/18

LOURENS MARTHINUS BOTHA SNR

Versus

GWANDA RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 19 OCTOBER 2018 & 9 MAY 2019

Opposed Application

Advocate K.I. Phulu for the applicant
Advocate L. Nkomo for the respondent

MABHIKWA J: This is an application for leave to execute a judgment of this honourable court pending the Hearing of an appeal before the Supreme Court.

Brief background facts

The parties initially appeared for an arbitration process before an arbitrator of their choice, Honourable P. Ncube. The arbitral award was issued on 13 December 2017 following a dispute over some joint venture agreement between the parties. The arbitral award directed the respondent to pay to the applicant, the sum of $5 507 980,00 compensation due and payable in terms of clause 3 of the parties' joint venture agreement entered into on 17 December 2007.

Under cover of case number HB-151-18, HC 3273/17, applicant made an application to this honourable court for the registration of the said award in terms of Article 35 of the Model Law on International Commercial Arbitration, 1985.

Respondent vigorously opposed the application. However, after a protracted argument before my brother MATHONSI J, the application was allowed and the arbitral award by Honourable P. Ncube was thus declared registered as an order of this honourable court among other orders.

Dissatisfied with the judgment of the honourable court, the respondent, on 18 June 2018 filed a notice of appeal with the Supreme Court seeking the setting aside of the judgment.

Also unhappy with the filing of the respondent's notice of appeal, applicant has now filed the current application wherein he implores this honourable court to grant him leave to execute the court's judgment pending the appeal hearing on the grounds that the respondent has no prospects of success on appeal, that the grounds of appeal are without merit and that the appeal has simply been filed to buy time.

Needless to say, this application is vigorously opposed by the respondent.

The Law

It is trite that at Common Law a party cannot execute a judgment appealed against. A party wishing to execute can, however, approach the court *a quo,* if it has such jurisdiction, for leave to execute despite the noting of an appeal. See *NetOne Cellular (Pvt) Ltd* vs *NetOne Employees & Anor* 2005 (1) ZLR 275 (S) judgment No. S-40-05, per CHIDYAUSIKU CJ, as he then was.

Also in *Zimbabwe Mining Development Corporation and Anor* vs *African Consolidated Resources PLC & Ors* 2010 ZLR (!) 34 (S) per CHIDYAUSIKU CJ it was held tat:

> "The noting of an appeal has the effect of suspending a judgment. It is only then that the successful party can make a special application for leave to execute that a court can properly exercise its discretion." (The underlining is mine)

In casu, it is common cause that a valid appeal was filed with the Supreme Court by the respondent. It is common cause also that applicant has properly filed an application for leave to execute pending the said appeal giving reasons for the relief sought.

The issue for determination therefore is whether this court, after reading the documents filed of record and hearing arguments by both counsel, may, in the exercise of its discretion and on the law, grant or deny the application.

From the onset the court will stress that it is a basic and important tenet of our law in general, and also of our civil practice and procedure that the right to appeal is fundamental and critical to our justice system. Where the law confers the right of appeal on a litigant, it should not be rendered nugatory and abrogated without due process, and due process requires that a matter proceeds to finality, see also CHIDYAUSIKU CJ's (as he then was) comments in *Zimbabwe Mining Development Corp and Anor* vs *African Consol Resources PLC and Ors* 2010 (1) ZLR 34 @ 39F-G.

The court notes that in a litany of judgments, executing a judgment pending appeal has generally been considered undesirable. In *Nzara* vs *Tsangamu and Ors* 2014 ZLR 674 (H) Honourable MATHONSI J held that it is our important legal position that appellant has a legal right to test the correctness of a judgment before being called upon to satisfy the judgment that is being appealed against. The execution therefore of the judgment of the lower court before the determination of the appeal negates the absolute right to appeal and is generally not permissible.

The applicant, and to some extent the respondent have argued extensively on the merits and demerits of their respective cases which in a way and listening to them, was essentially re-arguing the case unwittingly. It is not the business of this court to hear once more a matter already argued and decided by this very court. In any event, the Supreme Court, is already seized with the appeal. It is not for me to pronounce an appeal before the Supreme Court a nullity. Only the Supreme Court can determine whether or not that appeal is a nullity.

It is for the above reasons that authorities clearly establish that at common law a decision of a lower court in respect of which an appeal has been noted cannot be executed upon. It can only be executed upon in exceptional cases and after leave to so execute has been granted. The court to which application for leave to execute pending appeal is ready has a general wide discretion to grant or refuse leave. If leave is to be granted, the court also determines the conditions upon which the right is to be exercised. The discretion would obviously have to be exercised judiciously and with caution.

In *NetOne Cellullar (Pvt) Ltd* vs *NetOne Employees & Anor* 2005 (1) ZLR 275 (S) 2 pg 281B-D the court went on to state that;

> "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 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 bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to 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 by."

It appears undesirable to me, that a court entertains and grants leave to execute pending an appeal when the application is made solely on the basis that the appellant has no prospects of success on appeal, especially when the whole purpose of the appeal will be defeated if execution were to proceed.

The issue of the prospects of success on appeal in fact amounts to asking the court in effect to review its own judgment which is being appealed against. The court has to consider that it is already *functus officio* and cannot vouch for the correctness of its own judgment. The consideration of prospects of success therefore can only be availed to the applicant where the appeal has been shown to be manifestly and wholly without merit..

The applicant has relied for example on the authority in *Econet (Pvt) Ltd* vs *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) where execution was granted.

However, that case in fact shows that execution pending appeal will only be granted where the appeal is frivolous and vexatious and hopelessly without merit. In that case, a Mr Chiyangwa being the President of the Affirmative Action Group which was a shareholder of Telecel Zimbabwe (Pvt) Ltd had been heard to say;

> "We can appeal to the Supreme Court. It will take a very very long time for Mr Masiyiwa to go on air. But once we do appeal, we set aside his licence, okay! Now he (Masiyiwa) knows that. Anybody who knows law knows that. What we are saying is that we do not want to do that. We don't want to be forced to do that. So, the only way we can be enticed not to do so is that lets come to some kind of reasonable, sensible business agreements".

Telecel does not deny that Mr Chyangwa made the statement set out above, neither did Telecel ever refute the statement. In addition, Telecel was in fact appealing to the Supreme Court in a matter wherein it had not been a party to the proceedings of the original law suit before SANDURA JP at the High Court. That being the case, it did not have *locus standi in judicio* to appeal against the order and so the noting of the appeal would not suspend the application of the order made. That case is clearly distinct from the present one in that "Telecel's prospects of success on appeal were virtually nil. Many improprieties had taken place. There was no appeal by the respondents to the application before SANDURA JP. It was clear that the appeal was noted merely for the purpose of delay and harassment."

In my view, the Telecel Zimbabwe Ltd appeal was a classic case of a frivolous and vexatious appeal. Consequently the *Econet (Pvt) Ltd* vs *Telecel Zim (Pvt) Ltd* case is a classic example of the very few cases wherein applications for leave to execute pending appeal have been granted. It is where the appellant has taken a matter on appeal with clearly no bona fide intention to test the correctness of the judgment appealed against, that the court may, in the judicious exercise of its discretion, allow execution pending the appeal.

In casu, without delving into the merits of the appeal, the issue of the validity of the Joint Venture Agreement (JVA), in the light of *Watson* vs *Gilson Enterprises (Pvt) Ltd and Ors* 1997 (2) ZLR 318 (H) upheld and reiterated in the case of *Watson* vs *Gilson Enterprises (Pvt) Ltd and Ors* 1998 (1) ZLR 328 S) is reasonably arguable before the Supreme Court.

Secondly, counsel for the appellant argued that the net effect of the appeal is that even if the appeal succeeds, it simply sets aside MATHONSI J's confirmation and registration but the arbitral award itself by Mr P. Ncube remains but unconfirmed leaving the appeal outcome academic and in an undesirable state of affairs.

Counsel for the respondent on the other hand argued that such a submission is erroneous. He argued that if the appeal succeeds then the provisions of Articles 35 and 36 of the Model Law on International Commercial Arbitration 1985 as amended kicks in to regulate recognition and enforcement

This in my view is another example of a point arguable before the Supreme Court

Thirdly, I take my brother MATHONSI J's view that where the judgment sought to be executed pending appeal sounds in money, and the successful party has offered security *de restituctio*, then this may somewhat balance the preponderance of equities and the court may, in its discretion allow execution. In the absence of an offer for security as in this case and the judgment is sounding in money which is a large sum if money, execution potentially may lead to irreparable harm in the event that the appeal later succeeds. In any event, it is common cause that the Supreme Court is already seized with the appeal. The parties have already long been called upon to file their heads of argument which they have done and what remains is the date of hearing.

I am not persuaded to hold that the respondent's appeal is manifestly or hopelessly without merit nor that it was noted merely for the purpose of delay and harassment. It appears to me to be a bona *fide* attempt to test the correctness of the judgment appealed against. It would therefore not be in the interests of justice and I would be exercising my discretion injudiciously in my view, if I allow this execution pending appeal.

Accordingly, the application for leave to execute pending appeal is dismissed with costs.

Messrs Vundhla-Phulu & Partners, applicant's legal practitioners
Messrs Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners