MYDALE INTERNATIONAL MARKETING (PVT) LTD
versus
DR ROB KELLY
and
HAMMER AND TONGUES (PVT) LTD

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 18 June 2009 and 13 January 2010

Opposed Court Application

F M Katsande, for the applicant
Mrs *J B Wood*, for the first respondent

GOWORA J: The first respondent herein had under case No HC 1049/09 instituted proceedings against the applicant and second respondent herein. On 30 March 2009 OMERJEE J issued an order as follows:

IT IS ORDERED THAT:

1. Mydale International Marketing (Pvt) Ltd is entitled to receive from the second respondent and have in its custody and under its control vehicles registration number No AAU 8190, ABC 3354 and AAP 1952

2. Mydale International (Pvt) Ltd shall record the mileage on each vehicle from the time of receipt from the second respondent

3. Mydale International (Pvt) Ltd shall be entitled to ordinary use of the motor vehicles and shall not sell or otherwise alienate the said motor vehicles without an order of court.

4. Messrs Byron Venturas & Partners shall within 24 hours of the order surrender to the Registrar of the High Court, Harare the US$28 500 the proceeds for the sale of the six motor vehicles owned by Mydale International (Pvt) Ltd for retention by the registrar pending the determination of any dispute over ownership of Mydale International Marketing (Pvt) Ltd.

On 4 April 2009 the first respondent noted an appeal against the order and as a result he did not surrender the money to the registrar as had been ordered. On 21 April 2009 the applicant launched these proceedings under a certificate of urgency for the grant of a

Provisional Order. The respondent having filed a notice of opposition and opposing affidavits the matter was not heard on an urgent basis. Instead the learned judge before whom the matter was placed gave directions to the parties to file pleadings and thus the matter was converted into an opposed court application. The second respondent has not filed any papers in this matter and I will as a result refer to the first respondent as the respondent.

The matter was not heard on an urgent basis and the interim relief being sought was not granted. The applicant has not however filed an amended draft order and from the submissions by counsel it is clear that what is sought is an order in terms of the final relief on the provisional order. That part of the order depended on the court having granted interim relief. A word of caution should be sent to legal practitioners to ensure that a draft order must be filed where an urgent application has been ruled not to be urgent and the matter proceeds on the basis of the provisional order initially filed with the application. A party must ensure that it moves for the order that it wishes for. Where a provisional order is left without interim relief having been granted it should not be left to the judge to decide what order should be granted to the prejudice to parties in the dispute. As it is the order in *casu* presents me with a number of challenges. In the final relief it is sought that the Registrar of the High Court pay to the applicant the sum of US$28 500-00 upon satisfactory proof that it owned the vehicles sold by Hammer & Tongues. Before considering the terms of the final relief I have to deal with the interim relief which was not granted.

The terms of the interim relief being sought were the following:

INTERIM RELIEF GRANTED

(a) Pending appeal, within 24 hours of the service of this order on him, the first respondent and his lawyers Messrs Venturas & Samukange shall comply with para 4 of the judgment by OMERJEE J in case HC 1049/09 dated 3 April 2009

(b) Failing compliance the first respondent and the said lawyers shall within a further 24 hours appear before this honourable court to show cause why he/they should not be committed to prison for contempt of court.

The order by OMERJEE J is still extant in the sense that it has not been set aside by the Supreme Court. The order was to the effect that the money which is subject matter of a dispute between the applicant and the first respondent be deposited with the registrar until the ownership of the shareholding in the **applicant** has been determined.

The respondent has taken the position that he noted an appeal and as a result did not need to comply with the part of the order requiring that he surrender the money to the registrar. In the interim relief sought the applicant sought to make the order operational without having sought from court an order for execution of the judgment pending appeal. Although the underlying theme in the body of the founding affidavit is to the effect that the judgment was interlocutory and could not be appealed against, the order being sought for the legal practitioners of the respondent to pay the money to the registrar seems to recognize the validity of the appeal, as the preamble to the order sought shows.

The applicant has made much of the allegation that the appeal was made in order to frustrate the execution of the order by the learned judge. The question as to whether the appeal has merit is not before me and I cannot delve into such an issue. The applicant also avers that the appeal is null and void for want of validity as the judgment is interlocutory. The applicant cited no authority for this proposition. It is a generally acceptable principle that at common law the noting of an appeal suspends the operation of a judgment, and that the consequence of the noting of the appeal is that the execution of the judgment is stayed unless the court directs otherwise. Normally the party intending to execute against the judgment would approach the court for leave to execute pending appeal. The applicant has not applied for leave to execute pending appeal which is a necessary procedural step. The leading case in South Africa which has been followed by our courts is that of *South Cape Corporation* (*Pty*) *Ltd* v *Engineering Management Services* (*Pty*) *Ltd*[1]. At p 544H-545C CORBETT JA stated:

> "Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store* (*Pty*) *Ltd* v *Estate Marks & Anor*, 1961 (2) S.A. 118 (T) at pp120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and given effect thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifants Tin "B" Syndicate* v *De Jager*, 1912 A D 377 at 481; *Reid and Anor* v *Godart & Anor*, 1938 A D 511 at p 513; *Gentiruco A.G.* v *Firestone S A* (*Pty) Ltd* 1972 (1) S.A. 589 (A.D.) at p 667; *Standard Bank of S A Ltd* v *Stama* (*Pty*) *Ltd* 1975 (1) S A 730 (A.D.) at p 746.) The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to intending appellant either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid*'s case *supra* at p 513).

[1] 1977 (3) 534

> The Court to which application for leave to execute is made has a general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (See *Voet*, 49.7.3; *Ruby*'s *Cash Store* (*Pty*) *Ltd* v *Estate Marks & Anor*, *supra* at p 127. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (*c.f. Fismer* v *Thornton*, 1929 A.D. 17 at p. 19)."

In my view before seeking to have the court order that the respondent deposit with the Registrar the money in dispute before the parties, the applicant ought to have sought an order to the effect that the appeal was null and void for want of compliance with the rules on the grounds that the order was interlocutory or for an order for leave to execute pending appeal. It is also pertinent to note that the appeal is before the Supreme Court and it is in my view the Supreme Court which should state whether or not the appeal is null and void for want of compliance with the rules. In the absence of such a declaration it is not open to this court to find that the appeal is null and void. The applicant has done neither and it is therefore not in this court's power to order that the respondent complies with the order of OMEREE J. In para (b) of the draft order it is sought that failing compliance this court finds that the respondent and his legal practitioners who have not been cited in these proceedings appear before the court within 24 hours to show cause why they should not be committed to prison for contempt. It would seem to have escaped the attention of the learned counsel for the applicant that a part against whom an order of contempt is sought must not only be personally cited but that process for such citation must be personally served on the respondent. I do not have any party from the legal practitioners of the respondent cited personally and I will therefore not dwell further on this aspect.

I turn next to deal with the terms of the final relief which is what I assume the applicant really sought not only from the founding affidavit, but from submissions by counsel both written and oral. What the applicant seeks in final terms is as follows:

FINAL RELIEF GRANTED

(a) That the Registrar of the High Court shall pay to the applicant US$28 500-00 subject to satisfactory proof by the applicant that it owned the motor vehicles sold by the second respondent to raise the said amount of US$28 500-00.

(b) The first respondent shall pay the costs of the application

A perusal of para 4 of the order issued by OMERJEE J shows that the money that was to be surrendered to the Registrar was to be retained by him pending the determination of the

dispute of the ownership of the shareholding in the applicant. That dispute as far as I am aware has not yet been determined. The applicant has come to court for relief which would have the effect of nullifying that order in that the Registrar would hand over to the applicant the monies in dispute without the resolution of the ownership of the shareholding in the company. A company is owned by its members and the benefit accruing to a company is that of its members, and there is a dispute as to who the members of the applicant are. This was a dispute that was simmering when OMERJEE J heard the matter. It is important that it be resolved. It has not. The representative of the applicant in these proceedings seems to be oblivious to the effect of the order given and seeks that this court nullifies an order that has been granted by the same court. In my view this court cannot order that the money mentioned in para 4 of the order dated 30 March 2009 be paid to the applicant. It is relief that is not available on the papers before me. The effect of that order would go beyond what OMERJEE J ordered and would in effect have the effect of confirming that Mr Peter Valentine did own shares in the applicant without a proper resolution of the dispute as to who owns shares in the applicant.

The question as to who owns shares in the company is, I believe, directly linked to the point in *limine* raised by the respondent as to the *locus standi* of Mr Valentine in instituting these proceedings. The respondent has filed as part of his papers an affidavit from one Obaid Salem who claims not only beneficial interests in the company assets but also the vehicles which were the subject matter of the dispute before OMERJEE J. The notice of appeal filed by the respondent challenges the order by the learned judge that the vehicles in question be retained by the applicant as it is contended by the respondent that the vehicles do not belong to the applicant, but to Salem. As the proceeds of the cash being sought to be paid over to the applicant are from the sale of the vehicles, it is mischievous for the applicant to seek to have the order by OMERJEE J reversed by having the money handed over to itself taking into account all the factual disputes that are apparent on the pleadings. In my view the applicant's representative has not satisfied me that he has *locus standi* to institute proceedings on behalf of the applicant.

For all the reasons stated above the application is ill-conceived and it therefore must fail. In the result the application is dismissed and the applicant is ordered to pay the costs of the application

F M Katsande & Partners, legal practitioners for the applicant
Venturas & Samukange, legal practitioners for the respondent