CHAMAVHARA PROPERTIES [PVT] LTD t/a GREAT ZIMBABWE REALTORS
versus
RAY MUZENDA
AND
ZIMBABWE LIBERATORS PLATFORM

HIGH COURT OF ZIMBABWE
MAWADZE & MAFUSIRE J
HARARE, 17 & 24 May 2017

Civil Appeal

Ms *E.Y. Zvanaka*, with her, Mr *J. Mpoperi*, for the appellant
Mr *N. Munhungowarwa*, for the respondents

MAFUSIRE J: This was an appeal against the judgment of the magistrate's court sitting at Masvingo on 10 November 2016. That day was the return date for a rule *nisi* previously granted by the same court on 7 October 2016. The rule *nisi* had stayed a certain warrant of ejectment and execution against property by the appellant against the respondents. So, on the return date the court effectively confirmed the rule *nisi*. However, contrary to the general rule that costs of suit follow the event, the costs were awarded against the respondents. There was some confusion whether the scale of such costs was party and party or attorney and client. They were in fact party and party.

The sequence of events, and the background facts were as follows.

At all relevant times the respondents were tenants of the appellant in respect of certain premises. In April 2015 the appellant issued out a summons in the magistrate's court seeking confirmation of the cancellation of the lease agreement; the ejectment of the respondents; the payment of arrear rentals in the sum of $1 104 as at March 2015; and holding over damages at the rate of $506 per month from April 2015 until the date of eviction.

The respondents contested the claim. The matter was prosecuted right up to the trial stage. At trial, the parties found each other. They settled. A draft order by consent was crafted. But it was very loosely worded. It said the issue of eviction had been set aside; that judgment would be granted against the respondents in the sum of $7 285; that the amount

would be discharged in monthly instalments of $700, beginning the end of August 2016; and that in the event that an instalment was not paid on due date then the whole amount would become due and owing "at once", with the respondents, and all those claiming occupation through them, being evicted "*forthwith*".

On 16 August 2016 the draft order by consent was issued by the court in that form. The parties went away. But by end of August 2016 the respondents had not paid the first instalment. On 6 September 2016 the appellant issued the warrant of ejectment and execution against property. On 3 October 2016 the messenger of court served the warrant and gave the respondents 48 hours' notice to vacate the premises. In addition, he attached several items of office furniture and a vehicle. The respondents reacted by filing an *ex parte* application for stay of execution on 7 October 2016. The draft order to that application seems to have been stamped by the provincial magistrate on the same date.

On 28 October 2016 the appellant filed its notice of opposition. On 10 November 2016 the matter was argued. The magistrate confirmed the rule *nisi*. The warrant of ejectment and execution against property was stayed. But the respondents were ordered to bear the costs. The *ratio decidendi* of the magistrate's judgment was practically one sentence. It read:

> "*There was willingness from the Applicant to pay the dues and this was shown by him paying twice even before the other date was due*."

The appellant appealed. The ground of appeal was that the magistrate had erred in granting a stay when the respondents had clearly been in breach of the order by consent.

The respondents also cross-appealed. They attacked the award of costs against them which they alleged was on the scale of attorney and client. But, as already been mentioned, this was mere confusion. The magistrate's award of costs was on the ordinary scale. At the hearing of the appeal, both parties conceded the confusion. The cross-appeal was withdrawn.

The mainstay of the appellant's argument on appeal was that the decision of the court *a quo* in staying execution was so grossly unreasonable as to defy all logic. It was argued that given that the court had accepted that the respondents had been in breach of the order by consent, its decision was not supported by any principle of law and that its reasons for judgment were inarticulate or practically non-existent.

On their part, the respondents' argument had a lot of clutter. But they did raise an important principle, namely that a court has an inherent power to control its own process.

In our view, the appellant's appeal is not sustainable. This is so for a number of reasons. The substance of the appeal is such that if it is upheld, then the appellant becomes free to proceed with the warrant of ejectment and execution against property. But the first problem is that the hearing, Mr *Mpoperi*, for the appellant, virtually conceded that the warrant had been improperly issued.

The starting point is that the order by consent, in the last paragraph, provided that in the event of an instalment remaining unpaid on due date then the whole amount would become due and payable. Thus, the right of the appellant to get paid the full amount all at once instead of an instalments was conditional upon the respondents' breach. There was no eviction order issued. Under such circumstances, a warrant could only be issued if the condition had come to pass. In other words, until it was shown that the respondents had defaulted, the magistrate could not just issue the warrant.

On record, there was no information on how the warrant had got to be issued. But speaking from the Bar, Mr *Mpoperi* said on learning of the respondents' default, the issue of how to enforce the order by consent by warrant exercised his mind. He said they were not sure whether or not the appellant had to do an affidavit to explain the default and to have the warrant issued. There was no notice to the respondents. That was manifestly unprocedural.

One reason why Mr *Mpoperi* might have faced the dilemma that he said he faced was because the consent order which the parties had got the magistrate to rubber-stamp had not been thought through properly. Among other things, the typical wording for a standard acceleration clause reads something like:

> *In the event that an instalment remains outstanding beyond the due date, then the entire balance outstanding at the time of the default will immediately become due and payable, and the creditor shall have the right, without notice to the debtor, to make a chamber application for a default judgment and to issue a warrant of ejectment and execution against property.*

It was improper for the appellant's legal practitioners to approach the magistrate on their own, without notice to the respondents, to have the warrant issued. It was equally improper for the magistrate to have entertained them in the absence of the respondents. The order by consent was not an order of eviction. In the event of a default, it merely formed the basis of a cause of action for a default judgment and the issued of the warrant.

Therefore, for this reason the appeal cannot succeed because the warrant is invalid.

The second problem with the appeal was that the issuing of the warrant of ejectment and execution against property was predicated on the alleged default by the respondents in paying the first instalment due at the end of August 2016 in terms of the order of consent. For them to be penalised, the respondents' default must have been wilful or culpable. If the default was due to circumstances beyond their control, they could not possible be penalised. By not giving them any notice of its intention to issue the warrant, the appellant denied the respondents the opportunity to explain. That probably was the reason why, when the warrant was served on them, they reacted by filing the *ex parte* application.

The *ex parte* application was predicated on the allegations that the respondents had failed to meet the end of August 2016 deadline because the appellant had not availed its banking details, that these were availed only after the intervention of the respondents' legal practitioners, and that once they had been availed, the respondents had then made two payments. Copies of bank transfers attached to the founding affidavit showed deposits in favour the appellant in the sums of $700 and $1 206 on 15 September and 30 September 2016 respectively.

It was further alleged in the *ex parte* application that the respondents had always exhibited a willingness or enthusiasm to pay that such had been frustrated by the appellant's reluctance to avail the banking details.

In our view, the reasons proffered by the respondents in the *ex parte* application for failing to pay on time seemed manifestly tenuous. Specifics were carefully avoided. For example, nothing was said about whether in fact such banking details had ever been requested; who might have requested them; by who might such request have been refused, and when; by when were the banking details eventually supplied; what form had the alleged intervention by the lawyers taken; and so on. There was even no mention of who those legal practitioners were. There was no supporting affidavit. Yet the reasons for the respondents' failure to meet the end of August 2016 payment were the bedrock for the application for a stay.

But whilst the respondents might have glossed over important aspects of their application, the appellant's response was worse. Tightly or wrongly, the *ex parte* application had been granted. So the onus was now on the appellant to overturn it on the return day. But

its opposing affidavit was merely argumentative, repetitive and a series of unhelpful syllogisms. It said:

> "… the averment that the Applicant did not have the 1st Respondent's banking details is a deliberate lame excuse for failure to pay the terms of the Court order by consent. The fact of the matter is that if the Applicants' did not have the 1st Respondent's banking details, they should have requested for same before the time frames stipulated in the Court Order by Consent had expired. This they did not do for naught reason [sic]. Nothing has been attached to show that written communication was made requesting for [sic] the banking details which the Applicants were denied by the 1st Respondent. The only logical conclusion therefore is that the issue of the banking details not having been furnished is a mere excuse for not paying on time as agreed in the Court Order by Consent. In fact, having entered in a Court Order by Consent, it would not make sense that the 1st Respondent would refuse with its banking details."

Before us, Ms *Zvanaka*, also for the appellant, tried to salvage the situation by arguing that it must be accepted that the respondents have had the banking details well before because they had been tenants of the appellant for a long time. That was unhelpful. That was mere deductive reasoning. Whether or not the respondents did have the banking details; whether or not they had requested them before August 2016 deadline; whether or not the appellant reused to avail them; and whether or not lawyers had had to intervene to have the appellant release them, were all matters of fact. Facts are not proved through syllogism. The order by consent did not even state the mode of payment. This was something so elementary. It should have been made an integral part of the order by consent.

It therefore follows that there was a factual dispute before the court *a quo* on the reasons for the respondents' default. But it seems the court resolved that dispute in favour of the respondents. It said in its reasons for judgment:

> "Even oral evidence is admissible thus this court and then argument [sic] that the banking details were requested [for] was made orally."

Thus, it seems the court made a finding of fact that the respondents had indeed sought the banking details, albeit orally. Given that the court went on to confirm the rule *nisi*, we can only assume that it had accepted that the banking details had been requested timeously; that they had initially been refused, and that therefore this was an acceptable reason to stay the warrant.

In this appeal, other than complaining about the paucity of the magistrate's reasons for judgment, the appellant has not shown in what specific respect it could be said the

magistrate's decision was so grossly unreasonable and so outrageous in its defiance of logic that no sensible person who had applied his mind to the question could have arrived at it: see *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 [2] ZLR 452 [SC]. In our view, given the sequence of events, particularly the appellants' own shortcomings in its opposition to the application for stay, it cannot be said the decision of the court a quo was misdirected. The court could have been elaborate with its reasons for judgment. However, such a shortcoming is not, in our view, so fundamental as to make the decision impeachable.

The second point above leads us to the third and last, why, in our view the appeal cannot succeed.

In an application for a stay of execution the court considers what serves **real and substantial justice**: see *Cohen* v *Cohen* [1] 1979 RLR 814; 1979 [3] SA 420 [R]; *Chibanda* v *King* 1983 [1] ZLR 116 [SC]; *Mupini* v *Makoni* 1993 [1] ZLR 80 [S] and *Muchapondwa* v *Madake* & *Ors* 2006 [1] ZLR 196 [H]. The premise on which a court may grant a stay of execution is the inherent power reposed in it to control its own process. In *Cohen's* case above GOLDIN J said[1]

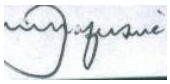
> "Execution is a process of the Court and the Court has an inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted **on the basis of real and substantial justice**. Thus, where injustice would otherwise be caused, the Court has the power and would, generally speaking grant relief." [emphasis added]

Therefore, unless it could be shown that the court a quo exercised its discretion injudiciously or capriciously; or that it acted upon a wrong principle; or that extraneous or irrelevant considerations influenced its discretions, there can be no basis for the appeal court interfering: see *Zimbabwe Banking Corp Ltd*. *v Mushamhanda* 1995 [2] ZLR 417 [S]; *Barros & Anor*. v *Chimponda* 1999 [1] ZLR 58 [S] and *Goto* v *Goto* 2001 [2] ZLR 519 [S].

For the above reasons the appeal is hereby dismissed with costs.

24 May 2017

[1] At p 423 B - C



Hon Mafusire J

Hon Mawadze J I concurred: _____

Saratoga Makausi Law Chambers, legal practtioners for the appellant
Mwonzora & Associates, legal pratitioners for the respondents