BRIAN DAVIES

Versus

FLOYD AMBROSE

And

**THE OFFICER COMMANDING
ZIMBABWE REPUBLIC POLICE –
MATABELELAND NORTH PROVINCE**

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 & 25 MARCH 2021

Urgent Chamber Application

J. Tshuma for the applicant
N. Sibanda for 1st respondent

MOYO J: This is an application for leave to execute pending appeal. It is trite that in such an application at the centre of the determination are the prospects of success on appeal. The 1st respondent raised 2 points *in limine,* that is non-disclosure of actual facts and dirty hands. However, it is the view of this court that such information was not relevant to the dispute at hand, it being whether or not applicant should be allowed leave to execute an order of this court pending appeal. It is my considered view that in this application, applicant did not have to explain how the possession or dispossession came about. All applicant had to allege is that he has an order of this court that was granted by nature of an urgent application giving him possession of the property being the subject matter of this dispute. I accordingly find that there could not have been any material disclosure since this contest is not about ownership on rightful occupation or …… It is about leave to execute an order of this court that sought to restore possession to applicant of the disputed property. I accordingly dismiss the 2 points *in limine*.

On the merits, it is trite that in an application of this nature the reasonable prospects of success on appeal play a pivotal role. I should pause to state that in essence the gist of the remedy availed to an application that of leave to execute pending appeal is to ensure that a party is not unfairly prejudiced by a show or a

hollow appeal. Such a remedy is available to a party who behaves that a respondent is unfairly seeking to get on a hollow appeal in a bid to urge it as a stay of execution. It is trite that no appeal has against a default judgment, refer to the Supreme Court judgment of *Zvinashe* vs *Ndlovu* SC-40-06 wherein the Supreme Court stated thus:

It therefore follows that what applicant seeks is leave to execute an order stayed by on appeal most likely to fail, 1st respondent's counsel also argued that the applicant has alternative accommodation, I do not understand this submission because it is not a requirement in a spoliation shows that you should first prove that it have no other means or a place to reside. All one has to allege and prove in a spoliation is that they have been unlawfully deposed of their possession of an asset. It is my considered view that it is neither here nor there that the argument that led to applicant's possession of the despoiled property…….. from a Memorandum of Agreement subjected to lawful challenge. That is the very essence of the law of spoliation that were people with unassailable rights should respect the law by following the process. I am not aware of any precedent or authority in our law that allows a party to take the law into their own hands for the mere reason that they …… the property for the purported agent has been cancelled. One process demands that the party doing ownership approaches the court and seeks the court's lawful intervention then the necessary declaration of nullity of the purported agreement and the enforcement of such a declaration …….. lawful means.

The …….. cited by the 1st respondent of *Mumpande* vs *Grobler*, which is cited as …….. for ignoring the prospects of success on appeal, is in fact not in line with what is trite (if at all that is what the honourable court found). This court has no right to change the law, but simply to applying and interpret it. It defies logic that in such an application this court should close its eyes to the prospects of success which are in my view the crux of the matter as it were. I would accordingly not be persuaded to follow that position as it is not supported by law.

Further, the 1st respondent's counsel, emphasized the aspect of no specific or magnified averments an irreparable harm. It however, goes without saying that were a party is in occupation of an asset and they are unlawfully disposed that on its own results in some form of having b…… occasioned. I am

satisfied that the applicant has adequately given the parameters for the irreparable harm in paragraph 16 and 17 of the founding affidavit. I am not persuaded that some form of application of the magnitude must be tabulated first before relief can be granted. Again, if …… is what the case of *Mumpande* vs *Grobler*, set precedent for, I am not persuaded by that reasoning for the simple reason that it is my considered view that an applicant in such a case should merely show that there is some prejudice befalling him/her occasioned by having to wait for the appeal to be heard. I am not persuaded by the ……. of the magnitude …….. as I do not understand that purpose it seeks to achieve. In my view, all the applicant has to show is that indeed there is some prejudice occasioned by having to wait for the appeal. I accordingly hold the view that the facts presented by the applicant are sufficient to make a case for the relief sought.

On the costs

It is my considered view that the appeal that was made against a default judgment is unprecedented and not supported in our law. For the simple reason that it cannot see the day. It is a ……. appeal. It would have been almost obvious to the 1st respondent's counsel that the proper route to follow is to apply for rescission of judgment and have the whole matter revisited.

1st respondent has clearly adopted wrong procedure despite his strong belief in his rights. His rights can only be rightfully ventilated in an application for rescission of judgment that is the law. Application of a clearly wrong procedure and persistence despite applicant's protestations clearly puts applicant unnecessary, out of pocket and an order for punitive costs is warranted. Litigants and their lawyers must carefully prepare and take the appropriate course of action in addressing their concerns. An ill-founded step is a basis for awarding punitive costs.

It is for these reasons that I will grant the application with costs on a legal practitioner and attorney scale.

Webb, Low & Barry Inc Ben baron & Partners, applicant's legal practitioners
Tanaka Law Chambers, 1st respondent's legal practitioners