MERYSTAKE (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 22 November 2022

Opposed Application

Mr *T Tabana*, for the applicant
Advocate *S Banda*, for the respondent

CHINAMORA J:

Introduction

This is a court application, filed by the applicant on 28 September 2022, for leave to execute judgment pending appeal. The judgment which the applicant desires to execute was handed down in HC 1343/21 on 13 September 2022. After hearing arguments from the parties, I gave an *ex tempore* judgment allowing the relief sought by the applicant, and undertook to deliver a full judgment the next day. Here are the reasons for the order I granted on 17 November 2022.

Factual background

On the 24 August 2022, I heard submissions from Counsel for the respective parties in a trial brought to me as a special case in terms of rule 52 of the High Court Rules, 2021, although lawyers and judges commonly referred to it as *"a stated case"*. I reserved judgment which was subsequently handed down as aforesaid. The operative part reads:

> "Accordingly, I make the following order:
>
> 1. The defendant's point in *limine* on prescription be and is hereby dismissed'
> 2. The forfeiture of the plaintiff's two (2) truck horses namely Freightliner Columbia, chassis number IFUJAB033LK81155 and Freightliner Columbia chassis number TT409512, as well

as two (2) tanker trailers namely chassis number 3010 and chassis TT409512 by the defendant be and is hereby declared unlawful.

3. The defendant is hereby directed to release the two (2) truck horses referred to in paragraph (1) of this order horses namely Freightliner Columbia, chassis number IFUJAB033LK81155 and Freightliner Columbia chassis number TT409512, as well as two (2) tanker trailers namely chassis number 3010 and chassis TT409512 to the plaintiff within 48hrs of service of this order on the defendant.
4. The defendant shall pay costs of suit on the ordinary scale."

Thereafter (and to be exact, on 16 September 2022), the respondent noted an appeal to the Supreme Court against the entire judgment in HC 1343/21 rendered as HH-609-22, which appeal is still pending. This prompted the applicant to make the application *in casu*, seeking leave to execute the said judgment despite the filing of the appeal. The respondent opposed the application and file its opposing affidavit on 12 October 2022, and the matter was argued on 17 November 2022. Before considering the respective arguments of the parties, it is necessary to examine what an applicant should establish before the court for the relief of leave to execute pending appeal to succeed.

The relevant law

The starting point is to acknowledge that an appellant has an absolute right to appeal to a superior court in order to test the correctness or otherwise the judgment of the court *a quo*. However, the procedure which permits execution before an appeal is heard, though extraordinary, exists to deal with those appellants who appeal with no *bona fide* intention of testing the correctness of a lower court's decision, but wish to buy time or harass the successful party. Quite a number of cases in this jurisdiction have dealt with what is required when one seeks to execute in spite of the pendency of an appeal, and one more example will suffice to make the point. In the Supreme Court case of *Netone Cellular (Pvt) Ltd* v *Netone Employees and Anor* 2005 (1) ZLR 275 (SC) at 281, the factors which a court should consider were set out as follows:

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 the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to harass the other party.

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 be.

See also *Nzara v Tsanyau and Ors* HH 303-14

From the guidelines in the case law, it is evident that the overriding principle is what is just and equitable in the circumstances taking into account the plight of both parties. (See *Whata* v *Whata* 1994 (2) ZLR 277 (S) at 281B). With the position of the law in mind, I will proceed to consider and evaluate the competing arguments of the parties.

The applicant's submissions

It is the applicant's submission that its business would suffer irreparable harm if leave to execute is not granted, since the continued retention of the motor vehicles has hampered its ability to earn income from haulage operations. On the contrary, the applicant contends that no harm would accrue to the respondent if the trucks are returned pending the appeal. Additionally, the applicant argues that that the trucks have been exposed to harsh weather conditions for the past two years, resulting in depreciation of the vehicles. The further argument was that the appeal was not motivated by a *bona fide* intention to test the correctness of this court's judgment and, apart from being frivolous and vexatious and meant to harass the applicant, had no prospects of success.

In this respect, the applicant avers that the cause of action was forfeiture and it arose on the 9 November 2020. As such, it would have been premature to approach the court earlier, because the cause of action had not yet arisen. Again, on this point, the applicant contends that it acted within the period prescribed by s 193 (12) of the Customs and Excise Act [*Chapter 23:02*], and that the fact that s 196 (2) of the Act provides for lawsuits to be brought within eight months.

The applicant argues, in any event, that the court's finding that the cause of action was founded on forfeiture and not seizure settles the argument that s 193 (12) is meant for actions arising from seizure of goods, while s 196 (2) relates to all other actions. Furthermore, it was submitted that the Commissioner's discretion to set aside decisions of subordinate officers did not entitle him to act arbitrarily. Consequently, his decision was untenable at law. The applicant seeks costs on the higher scale of attorney and client, as it alleges abuse of court process by the respondent.

The respondent's submissions

In response, the respondent stresses that if leave to execute is granted, it will suffer irreparable harm in that there is no guarantee of recovering the forfeited vehicles, hence, the *fiscus* would incur irreparable harm. Consequently, it was vigorously contended that the balance of convenience favours the *status quo*. Turning to the grounds of appeal, the respondent maintains that the appeal is pregnant with merit and will most likely succeed. The grounds relied on are:

1. That this court erred in not upholding the respondent's special plea of prescription based on failure to institute proceedings within three months.
2. That the High Court erred and misdirected itself in finding that seizure and forfeiture are different causes of action
3. That this court erred and misdirected itself in not holding that the forfeiture of applicant's property had been done in terms of s 193 (19) of the Customs and Excise Act and was therefore lawful.
4. That this court erred and misdirected itself in granting a review application that was disguised as a lawsuit for a declaratory order.

The respondent further argued that allowing execution would effectively render the appeal a *brutum fulmen*. Thus, it made the converse submission that, if execution is stayed, the applicant would suffer a minor inconvenience from the delay, and that any likely prejudice could be cured by an appropriate order of costs. Having established the principles of the law that are relevant *in casu*, I will now apply the law to the factual scenario before me.

Analysis of the case

The respondent argues that this court erred by finding in the applicant's favour on prescription. In this respect, my finding was that the cause of action was forfeiture and not seizure. When the parties argued the matter, *Advocate Banda* for the respondent, accepted that s 193 (12) had a prescriptive period of three months, while s 196 (2) stipulates a period of eight months. Nonetheless, he argued that s 193 (12) was the intended period of prescription for cases whose cause of action emanated from seizure of goods. Then, the submission proceeds that s 196 (2) is meant for other lawsuits not based on seizure. However, counsel conceded that the legislation does not specifically provide for the distinction that he was urging the court to accept. Consequently, I find no substance in the prescription argument given the fact that the cause of action had not yet arisen. Besides, the cause of action on a proper consideration of the facts was forfeiture and not seizure. The reasons are available in detail in my judgment in HC 1343/21 and I will not repeat them as this would be unnecessarily repetitive. The decision made by the Commissioner was arbitrary in my findings and it was also on this basis that I found in favour of the applicant. I am of the view that the respondent's appeal is frivolous and vexatious, and has been filed in a bid to delay the execution of the judgment.

The applicant acted honestly and genuinely by following the conditions set by ZIMRA for the release of their truck horses and trailers. It was not reasonably foreseen that the respondent would make a complete U-turn and order forfeiture in the circumstances. As it stands, the applicant's vehicles have been in the possession of the respondent, and the concern that they are deteriorating is understandable. The applicant has suffered (and continues to suffer) financial loss as long as the vehicles remain detained by the respondent without doing any haulage business.

The respondent, on the other hand, desires to hold on to the vehicles arguing that, if they are released to the applicant the respondent would suffer no harm if they are not returned to it in the event its appeal is successful. Once the respondent conceded that it can claim damages if the vehicles are no longer available that resolves the matter in the applicant's favour. Thus, the balance of convenience leans in favour of the relief sought being afforded and, equally, the balance of hardship favours the same result. Consequently, looking at the application as a whole this court comes to the conclusion that the application for execution pending appeal has merit

and I am inclined to grant it. Ordinarily, costs are awarded to the successful party and I see no basis for departing from this time honoured approach.

The plaintiff has asked for costs on an attorney and client scale. Even though the respondent has not been successful in its opposition, I have to consider whether an award of costs at this punitive level is justified in this case. I observe that ZIMRA is an agency of government responsible for revenue collection whose operations are funded by the tax payers. In my view, it would unduly burden the public if punitive costs were to be awarded. Therefore, in the exercise of my discretion I will award costs on the ordinary scale.

Disposition

Accordingly, I grant the following order:

1. The application for leave to execute pending appeal be and is hereby granted.
2. The applicant be and is hereby granted leave to execute the judgment of this court granted on 13 September 2022 in Case Number HC 1343/21 pending determination of appeal noted by the respondent under Case Number SC 459/22.
3. In the event of respondent's failure to comply with the judgment of the court in HC 1343/21, the Sheriff or his lawful deputy takes the motor vehicles from the respondent and hand them over to the applicant or their legal practitioners.
4. The respondent be and is hereby ordered to pay costs on the ordinary scale.

Tabana & Marwa, applicant's legal practitioners
Sinyoro & Partners, respondent's legal practitioners