REPORTABLE (7)

Judgment No. SC 15/11
Civil Application No. 286/10

RITENOTE PRINTERS (PRIVATE) LIMITED v

(1) A ADAM AND COMPANY
(2) THE MESSENGER OF COURT, HARARE

SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 26 & MAY 31, 2011

T Mpofu, for the applicant

A T Tavenhave, for the first respondent

No appearance for the second respondent

Before: CHIDYAUSIKU, CJ, In Chambers

In this application the applicant (hereinafter referred to as "Ritenote Printers") seeks the following relief, set out in the draft order:

"1.1 An order for the urgent hearing of the appeal filed contemporaneously with this application under case number SC 285/10 be and is hereby granted.

1.2 The applicant shall file its Heads of Argument in respect of the appeal matter within five days of this order, whereupon the respondents shall file their Heads of Argument within five days of receipt of the applicant's Heads of Argument.

1.3 … (deleted)

1.4 Pending determination of the appeal, the applicant is restored into occupation of the leased premises being 109 Leopold Takawira Street and 147 Mbuya Nehanda Street, Harare.

1.5 The second respondent is ordered not to sell in execution any of the properties attached by him pending determination of the appeal.

1.6 That the costs of this application shall be (costs) in the cause."

The facts of this case are common cause. They are as set out in the founding affidavit to this application and aptly summarised in the judgment of the learned Judge in the court *a quo*. They are as follows - The first respondent (hereinafter referred to as "Adam & Co") instituted an action in the High Court for the eviction of Ritenote Printers from two premises it had leased to Ritenote Printers. Adam & Co also sought the payment of arrear rentals from Ritenote Printers. This was done in two separate actions. The first action was referred to trial and a trial date was set. The other action was still at the pre-trial conference stage. At that stage Adam & Co withdrew its actions in the High Court and then instituted the same proceedings in the magistrate's court. Adam & Co was successful in the magistrate's court and the magistrate's court ordered the eviction of Ritenote Printers as well as the payment of arrear rentals.

Dissatisfied with the magistrate's judgment Ritenote Printers appealed against it to the High Court. Ritenote Printers, most probably because of the wording of s 40(3) of the Magistrates Court Act [*Chapter 7:10*] ("the Act") concluded that the noting of the appeal would not suspend the order of the magistrate's court. Ritenote Printers accordingly filed an application in the magistrate's court for the stay of execution pending the determination of that appeal.

Section 40(3) of the Act provides as follows:

"**40 Appeals**

(1) …

> (2) …
>
> (3) Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

That application was dismissed by the magistrate on the ground that the magistrate was of the view that she could not grant such relief, as the noting of the appeal had suspended the operation of the magistrate's order. The following is the magistrate's ruling:

> "This is an application for stay of execution by the applicant who is the respondent in the main matter. The applicant appealed against the decision of the court *a quo*, which appeal automatically suspended the operation of the judgment. The applicant is now applying again for stay of execution …, which is vague and embarrassing since execution has been stayed already by the appeal.
>
> However, the applicant has no prospect of success at the High Court and (the) balance of convenience favours the respondent who is the applicant in the main matter.
>
> Accordingly the application for stay of execution is dismissed with costs."

If the learned magistrate had dismissed the application on the basis that the appeal had no prospects of success, which appears to be her view, I would have no problem with that ruling. However, a proper reading of her judgment clearly suggests that she dismissed the application because she was of the erroneous view that the noting of the appeal automatically suspended her judgment. This is not what s 40(3) of the Act provides. What happens upon the noting of an appeal against the magistrate's judgment is governed by s 40(3) of the Act. Adam & Co would probably not have needed to apply if the learned magistrate had dismissed Ritenote's application on the basis that Ritenote's appeal had no prospects of success.

In my view, the wording of s 40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of an appeal. It follows therefore that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such an application the magistrate exercises the judicial discretion and makes a proper determination.

In casu, Ritenote Printers applied for the stay of execution of the order pending the determination of the appeal. The learned magistrate dismissed that application on the erroneous basis that her judgment had been suspended by the noting of the appeal. In effect her ruling was that her judgment cannot be executed because it had been suspended by the noting of an appeal. That determination, though based on a misdirection, is extant.

Adam & Co did not apply for leave to execute the judgment in its favour despite the noting of an appeal. As I have said, my reading of s 40(3) of the Act is that if Adam & Co wished to execute despite the noting of an appeal it had to apply for such leave. *In casu* Adam & Co would probably not have needed to make the application if the learned magistrate's ruling had not been predicated on a serious misdirection. Adam & Co simply instructed the Messenger of Court, the second respondent, to evict Ritenote Printers and attach its property, which the Messenger of Court duly did.

Ritenote Printers, upon being evicted, applied to the High Court seeking to set aside the eviction and the attachment of its property. The application was based on two grounds - firstly, that Adam & Co did not apply for and obtain an order to execute the judgment of the magistrate despite the noting of the appeal, as is required by s 40(3) of the Act; and secondly, that the effect of the magistrate's ruling, cited above, was that Adam & Co could not execute the judgment because in the magistrate's opinion the noting of an appeal had the effect of suspending her judgment.

It is quite clear that the magistrate's ruling, right or wrong, was that Adam & Co could not execute her judgment. As I have already stated, that judgment, though erroneous, is extant. Until it is set aside, it bars Adam & Co from executing the judgment.

GOWORA J dismissed Ritenote Printers' application. In her reasons for judgment the learned Judge analysed in some detail the authorities on the doctrine of inherent jurisdiction enjoyed by the superior courts. She concluded, quite correctly in my view, that that jurisdiction empowers the superior courts to regulate their own process. Included in that jurisdiction is the courts' power to order execution of their judgments despite the noting of appeals. The learned Judge also concluded, again quite correctly in my view, that inferior courts do not have this inherent jurisdiction to regulate their own process. The power as to what inferior courts can do or cannot do is to be found within the four corners of the Act that creates them, in the present case the Magistrates Court Act and in particular s 40(3) of

the Act. The learned Judge further concluded that the common law position that the noting of an appeal suspends the judgment appealed against does not apply to the magistrate's court. Consequently, the judgment in favour of Adam & Co was not suspended by the noting of an appeal by Ritenote Printers.

The learned Judge further reasoned that because the noting of the appeal did not suspend the learned magistrate's judgment, Adam & Co were entitled to execute that judgment. In my view, this is where the learned Judge erred. Firstly, the ruling of the magistrate that her judgment had been suspended by the noting of the appeal, though erroneous, was extant. While that judgment was extant Adam & Co could not act in contravention of it. The learned Judge did not set aside the magistrate's ruling. There was no appeal against that ruling. The application before the learned Judge was simply to set aside the eviction and attachment orders. The parties simply ignored it. Secondly, s 40(3) of the Act regulates the issue of execution and stay of execution upon the noting of an appeal. It confers on the magistrate's court the discretion to authorise either. That discretion is a judicial discretion to be exercised upon the making of an application by either party. Thus a party, in this case Adam & Co, that wishes to execute despite the noting of an appeal, has to apply to the magistrate for the magistrate to exercise the discretion in its favour before it can execute the judgment. Adam & Co made no such application and, in my view, cannot execute without an order authorising execution from the magistrate. Equally if the losing party, in this case, Ritenote Printers, wishes to stay execution despite the noting of an appeal, it has to apply for such relief. This is what Ritenote did. Regrettably the learned magistrate dismissed the application, on the erroneous basis that the application was superfluous as her judgment had been suspended by

operation of law. The effect of the magistrate's ruling is that Adam & Co cannot execute against Ritenote.

As I have already indicated, Adam & Co cannot, in terms of s 40(3) of the Act, execute until it has applied in terms of that section to execute its judgment and that application has been successful. It has made no such application. Consequently, in my view, it was not be entitled to execute.

In the result, I am satisfied that Ritenote Printers has established a *prima facie* right, which is likely to be confirmed on appeal to this Court, entitling it to the interim relief that it has sought in this Chamber application. Once the interim relief is granted, the need to hear the appeal on an urgent basis falls away.

I would therefore grant the application and make the following order –

(1) Pending the determination of the appeal, the applicant is restored to the occupation of the leased premises, being 109 Leopold Takawira Street and 147 Mbuya Nehanda Street, Harare.

(2) The second respondent is ordered not to sell in execution any of the property attached by it pending the determination of the appeal.

(3) Costs in this application will be costs in the cause.

Hamunakwadi, Nyandoro & Nyambura, applicant's legal practitioners

Tavenhave-Machingauta, first respondent's legal practitioners