

CITY OF KWEKWE  
**versus**  
ANDREW WADI

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 4 JUNE 2018 AND 14 JUNE 2018

### **Urgent Chamber Application**

*L Nkomo* for the applicant  
*S Siziba* for the respondent

**MOYO J:** This is an urgent application where in the applicant seeks the following interim relief:

“Pending the confirmation or discharge of this order, applicant is granted the following relief:

That the execution of the judgment handed down under case number HB 51/18 be and is hereby stayed pending finalization of the application for condonation and extension of time to appeal filed by the applicant under case number SCA 384/18.”

The facts of this matter are that the two parties were embroiled in a land dispute which was finalized by this court in favour of the respondent. Applicant dissatisfied with the decision of this court sought to appeal to the Supreme Court. The appeal was however fatally defective. Applicant had to withdraw that appeal and then launch the application n that is the subject matter of these proceedings.

It is an application seeking condonation and an extension of time within which to lodge an appeal at the Supreme Court. Applicant seeks on order through this application to stay proceedings pending the finalization of its application before the Supreme Court.

Respondent raised a point *in limine* that this matter is not urgent and that this application should be deemed not to be urgent because applicant did not exhibit urgency in conducting itself prior to launching this application. The sequence of events as presented by applicant’s counsel

are that a judgment was granted in respondent's favour before this court on 1 March 2018. The appeal to the Supreme Court that is, SC 234/18 was filed on 13 March 2018. Service of the notice of appeal was done out of time on 23 March.

Respondent later filed an application for leave to execute pending appeal. On 2 May 2018 the respondent raised the fact that the appeal by applicant was fatally defective for want of appropriate service of the notice of appeal in terms of the Supreme Court rules. On 9 May 2018 applicant withdrew the problematic appeal and filed an application for extension of time with the Supreme Court.

The applicant then withdrew the fatally defective appeal subsequent to that and then filed before the Supreme Court the application being the subject matter of this matter. The cause to act on the basis of urgency therefore arose on 9 May 2018, when the Supreme Court appeal which automatically suspended execution against the applicant, was withdrawn. The applicant was thus exposed to execution and that is precisely when the need to act urgently arose. I am satisfied with the factual explanation given by the applicant on the background of this matter and I accordingly find that this matter is urgent.

On the merits, respondent opposed the application on the basis that applicant has an alternative remedy in the form of respondent's application for execution pending appeal and that that matter has been set down for 8 June 2018, and therefore there is no need to entertain applicant's concerns in this application.

The other ground for opposition of this application is that the Supreme Court application has no prospects of success as there is no reasonable explanation for failure to comply with the rules of the Supreme Court as well as the fact that there are no reasonable prospects of success on the appeal itself.

I hold the view that the application in HC 1073/18 being an application by the respondent for leave to execute pending appeal has since been overtaken by events since that appeal was withdrawn for want of compliance with Supreme Court rules. I thus hold the view that there is no matter addressing issues as are before me now, which has been set down as the case in HC 1073/18 is addressing execution pending an appeal which is now no longer in existence.

HB 144-18  
HC 1372-18  
XREF SC 234-18A  
XREF HCB 2759-17

On the other hand, this application seeks to address the scenario of staying execution pending the application for extension of time and for condonation filed at the Supreme Court. I believe the two cases are different especially considering that the other application is now for academic purposes. Respondent submits that at the hearing of the application for leave to execute pending appeal, an amendment will be sought to concert it to an application for leave to execute pending the application for an extension of time and condonation. I find this submission untenable, because how would this be feasible since the founding affidavit which formulates the basis for the application for leave to execute pending appeal is already couched for those circumstances? How can an application be converted so as to shift from its substance? In any event why not dispose of this application which addresses the specific issue relevant at the moment, and defer the matter to an application which is yet to be converted so as to make it applicable to the situation at hand? I hold the view that in the circumstances, the appropriate platform to deal with and dispose of this issue in this application as its substance has been formulated to precisely deal with the situation at hand.

As for the prospects of success on appeal it is for the Supreme Court to determine as well as the issue of whether leave to appeal out of time can be granted. It is the Supreme Court rules that have been breached and whether applicant should be condemned or not it is in the domain of the appeal court. I would therefore be inclined to allow the applicant a chance to have its application heard and determined by the Supreme Court before execution is conducted.

I accordingly grant the application in terms of the draft provisional order.

*Mutatu & Partners*, applicant's legal practitioners  
*Mhaka Attorneys*, respondent's legal practitioners