GOLDEN REEF MINING (PRIVATE) LIMITED
and
FERBIT INVESTMENTS (PRIVATE) LIMITED
versus
MNJIYA CONSULTING ENGINEERS (PTY) LIMITED
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 & 20 July 2015

**Urgent chamber application**

*Adv. E. Matinenga* with *J. Chikomwe,* for applicants
*Prof. L. Madhuku,* with *D. Mundia*, for first respondent
No appearance for second respondent

MAFUSIRE J: On 13 July 2015 I heard argument on an urgent chamber application. It was for a stay of execution. I reserved judgment. I kept thinking that the case being argued before me was not really the case that I had to make a ruling on. So I decided I needed time to check it out. But I directed and stressed that execution would be stayed pending my decision. This was not without reason. This reason shall soon emerge. At any rate, the Sheriff, the second respondent herein, had halted the execution once the application had been launched.

The case before me was almost a repeat application. NDEWERE J had dealt with it before. The background was this. In February 2015 the first respondent (hereafter referred to as "***the respondent***"), a South African registered entity with a shareholding in the second applicant, obtained, in the main action under HC 11024/14, a default judgment against the applicants. It went on to issue a writ of execution. Applicants' property was attached. On 3 March 2015, and under HC1921/15, the applicants applied for rescission of the default judgment. Simultaneously, they applied, on an urgent basis under HC 1922/15, for a stay of execution pending the determination of their application for rescission.

The application for stay was heard by the Honourable Judge on 20 March 2015. She reserved judgment. From the applicants' case before me, the respondent, or its counsel, or

both, were obdurate and quite combative. The applicants say upon reserving her judgment the learned Judge directed that the status quo *ante* would subsist until she had given her ruling. But despite that directive, the respondent sought to execute. Applicants' counsel first sought the assurance of respondent's counsel that his instructions to the Sheriff to proceed with execution would be withdrawn until the learned Judge had given her ruling. Applicants say respondent's counsel denied any knowledge of any such directive. Applicants' counsel then sought clarification from the Judge herself. Part of their lawyers' letter to the Judge's clerk read:

> "Quite contrary from the directive issued by the Judge, in our telephone conversation with Mr Mundia just before writing this letter, he has indicated that there was never a directive to maintain the status quo until the determination of the application. We are of the position that Mr Mundia's conduct borders on the line of contempt of the Honourable Judge's directive. Any judgment that may be eventually granted by the Judge in favour of the Appellants will be rendered academic and unenforceable owing to the acts of the Respondent.
>
> May the above disheartening developments be brought to the attention of Justice Ndewere for her intervention and possibly with the hope that her decision regarding the application is issued at the earliest opportunity to allow the parties to proceed accordingly."

The learned Judge's response was that she had indeed issued a directive during the hearing to the effect that the respondent would stay execution pending her determination.

In due course the learned Judge did issue a provisional order of stay of execution. That was on 21 April 2015. The interim relief read as follows:

> "[P]ending the determination of this matter the applicant is granted the following relief:
> 1. Execution of the default judgment granted by the court in the matter HC 11024/14 on the 2nd of February 2015 be and is hereby stayed."

The reference to "***this matter***" was undoubtedly a reference to the application for rescission of judgment that was pending. This emerges from a proper construction of the draft final order sought on the return day. In terms thereof, apart from the prayer for costs, the first respondent was called upon to show cause why a final order should not be granted that:

> "… the parties abide by the court's decision in the application for rescission of judgment filed by the applicant on the 3rd of March 2015, wherein the applicant hereto seeks to rescission (sic) of a default judgment granted by the court in the matter HC 2748/09 (sic) on the 22nd of January 2015 (sic)."

Despite the imprecision of the draft order and the obvious typing errors in it, it is clear that on 21 April 2015 this court stayed execution of the default judgment under HC 11024/14 pending the determination of the application for rescission of judgment under HC 1921/15.

But the matter went off the rails soon thereafter. On 4 June 2015 the respondent appealed to the Supreme Court against the provisional order. The ground of appeal was essentially that the learned Judge had got it all wrong to hold that proof of service of a summons at a *domicilium citandi et executandi* was not the same thing as proof that the defendant had actually seen that summons. The Judge was also attacked allegedly for having incorrectly exercised her discretion to stay execution. As a result, the respondent wanted the judgment set aside and substituted with an order dismissing the application.

The respondent's notice of appeal expressly stated that leave to appeal was not required. No reasons were advanced for saying that. At the hearing it turned out that the basis for such statement was s 43(2)(d)(ii) of the High Court Act, *Cap 7:06*. I shall come back to this aspect later on.

Soon after noting the appeal, the respondent instructed the Sheriff to proceed with execution. Applicants' property was advertised for sale. But applicants' officers got to know about it on 6 July 2015 from a business associate. They immediately swung into action. They checked and verified with *The Herald* newspaper that had published the sale advert. They also checked and verified with the Sheriff. He confirmed he had been instructed by respondent's counsel to proceed with execution, allegedly because the operation of the provisional order by NDEWERE J had been suspended on account of the appeal. The sale was scheduled for 11 July 2015.

On 8 July 2015 the applicants filed the urgent chamber application. The respondent filed no papers. But it was strongly opposed to the application, both on technical grounds taken *in limine,* and on the merits.

Respondents took two points *in limine*. The first was that the application lacked urgency. The argument was that the applicants knew very well that once the respondent had obtained the default judgment it was surely going to execute. It had indeed gone on to execute. It would have proceeded with execution but for the provisional order by NDEWERE J. But respondent's argument was that its notice of appeal had been served on the applicants on 5 June 2015. From then on the applicants should have known that the operation of the provisional order by NDEWERE J had automatically been suspended, thereby paving the

way for the resumption of the execution process. But it was not until a month later that the applicants had filed the urgent chamber application, so ran the argument.

I dismissed the respondent's first point *in limine*. Quite apart from the question whether or not the appeal was valid, which was applicants' one and only strong point in support of the application, I considered that the argument lacked merit on two fronts. The purpose of the appeal was not, and could not have been, so as to enable the respondent to proceed with execution. The purpose of the appeal to the higher court must have, or ought to have been, a genuine desire to correct a perceived wrong by this court. In the particular circumstances of this case, given that this court had, after a full hearing, seen it fit to stay execution pending the determination of the application for rescission of judgment, an appeal noted solely or essentially to allow execution to proceed, when the reason for the stay was still there, would have been, in my view, brazenly contemptuous and *mala fide*. Thus, it did not follow that once the respondent had noted its appeal, the applicants must have immediately anticipated that the respondent would be proceeding with execution forthwith.

The second reason why I dismissed the argument on urgency was that the applicants could hardly be accused of having slept on their rights. The time to start counting was not when the respondent had noted the appeal. It was when the applicants had got to know that the respondent had instructed the Sheriff to proceed with execution in spite of the provisional order. That time was 6 July 2015. Two days later the application was launched. Therefore, there was no delay.

Respondent's second point *in limine* was that this court was now *functus officio*. The argument was that the application before me was basically the same matter as determined by NDEWERE J before. It was said that the arguments proffered before NDEWERE J would be the same arguments to be proffered before me. The order sought was the same as that granted by NDEWERE J.

The submission that this court was *functus officio* was, in my view, self-serving. The matter dealt with by NDEWERE J was an application for stay pending resolution, by this court, of the application for rescission of judgment. The matter before me, despite the imprecision of the papers, was an application for stay pending the determination, by the Supreme Court, of the respondent's appeal. *Professor Madhuku*, for the respondent disagreed. He argued that the applicants had not come to seek execution pending appeal. He said execution pending appeal was a different premise altogether.

To some extent *Professor Madhuku* had a point. The draft interim relief sought by the applicants read as follows:

> "The execution against the Applicants' property pursuant to an appeal noted by the First Respondent against the Provisional Order granted by the Court under Case No. 1922/15 on 21 April 2015 is hereby stayed."

Nowhere in the applicants' papers was there was mention of a stay of execution pending appeal. But I was not about to be detained by an argument about substance over form. Admittedly, the applicant's founding papers, its draft order and even Counsel's argument during the hearing, were essentially that the respondent's appeal was invalid; that I must not recognise it at all; that nothing stems from an invalid process and that therefore the earlier provisional order had not been suspended. For that reason execution had to be stopped.

*Adv. Matinenga*, for the applicants, submitted that ordinarily this court would not be asked to consider the validity or otherwise of an appeal that lies at the Supreme Court. That would be the function of the Supreme Court. But in this case, he argued, the appeal was patently a nullity. And given the surrounding circumstances, it was a proper case for me to stay execution by ignoring it.

The flaw in *Adv. Matinenga's* argument, and which I pointed out during the hearing, was that if the matter was dealt with on that basis, and if I stayed execution, what then would be the position if the respondent again decided to appeal against my decision, thereby automatically suspending it? What would be the position if, on that account, and on its own construction of the effect of the appeal, the respondent would then decide to proceed with execution? *Adv. Matinenga's* reaction, perhaps tongue in cheek, was that if I were to grant a stay of execution; and if the respondents were to appeal against my order; and if on that account the respondent would decide to proceed with execution again, then the applicants would be forced to come back again for the third time. But where would it end?

That is precisely one reason why I felt that the issues being argued before me were not the actual case that I had to decide.

Be that as it may, I dismissed the respondent's second point *in limine*. The lack of precision in the applicant's papers and in its argument was, to me, all about substance over form. In my view, the substance of the applicants' application before me was a plea for a stay of execution pending the determination of the appeal. But whilst I could express my own

views about the the respondent's appeal to the Supreme Court, it was not my place to pronounce on its validity or otherwise. That was for the Supreme Court.

I ruled that this court was not *functus officio*. In the context of legal proceedings, to be *functus officio* is to lack legal competence to adjudicate on the proceedings because one would have disposed of them previously. To be *functus officio* is to have discharged one's office[1]. But before me the application for a stay of execution **pending appeal** was a new issue. It had not been the issue before NDEWERE J. I had to look at the application and determine it in accordance with the principles governing applications for stay of execution pending appeal.

Having disposed of the points *in limine,* the application proceeded in earnest on the merits.

In its papers, and at the hearing, the applicants' case, in summary, was this. Respondent's appeal was invalid. The provisional order by NDEWERE J was an interlocutory order which was unappealable without leave. No leave had been sought, let alone obtained. Since no result flows from an invalid process, the respondent could not possibly proceed with execution. JUSTICE NDEWERE'S order was still operative.

Reference was made to a plethora of cases on orders or judgments that are purely interlocutory from which no appeal lies without leave, and those having a final or definitive effect which are appealable without the need for leave. In applicants' heads of argument filed together with the application, reference was made to the cases of *Hunt v Hunt*[2] and *1, 2, 3 & 4 Combined Harare Residents Association & Anor v Registrar-General & Ors*[3]. But in my view, all these authorities were inapposite.

Other well-known and oft quoted cases on the point, both in this jurisdiction and South Africa, are *Dickinson & Anor v Fisher's Executors*[4]; *Pretoria Garrison Institutes v Danish Products*[5]; *South Cape Corporation v Engineering Management Services*[6]; *Zweni v*

[1] See BAXTER *Administrative Law* (1984) at p 372 and the case of *Chirambasukwa v Minister of Justice, Legal & Parliamentary Affairs* 1998 (2) ZLR 567 (S)
[2] 2000 (1) ZLR 165(H)
[3] 2002 (1) ZLR 83 (H) & (SC)
[4] 1914 AD 424
[5] 1948 (1) SA 839 (A)
[6] 1977 (3) SA 534

*Minister of Law and Order*[7]; *Jesse v Chionza*[8]; *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd*[9]; *Mwatsika v ICL Zimbabwe*[10]. There are many others.

Where to draw the line between decisions which are purely interlocutory and therefore unappealable without leave, and those which are final and having a definitive sentence and therefore appealable as of right, is a question that has vexed many eminent lawyers and jurists for centuries: *per* SCHULTS J in *Cronshaw, supra*[11] and DE VILLIERS J in *Davis v Press & Co*[12]. But the principle is now settled. It was summarised by CORBETT JA in the *South Cape Corporation* case, *supra*[13]. The term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. Orders of this kind fall in two classes: (i) those which have a final and definitive effect on the main action; and (ii) those that are simple, purely and properly interlocutory. A simple interlocutory order, i.e. a preparatory or procedural order, is not appealable without leave.

*Adv. Matinenga* urged me to find that the provisional order by NDEWERE J on 21 April 2015 was purely interlocutory. Indeed it was. There could be no rational argument against that. It was classically interlocutory because it did not decide the issue or dispute between the parties. In my view, it was actually an interlocutory matter within another interlocutory matter. The main dispute between the parties was in HC 11024/14, the action matter in which the respondent had obtained a default judgment. The application for rescission of judgment was itself an interlocutory matter. The application for stay was even more removed from the main dispute. It was an application within another application. In no way would it decide the application for rescission, let alone the dispute pending in the main action.

So ordinarily, no appeal could lie against such a provisional order as was issued by NDEWERE J. But the respondent nonetheless appealed against it without leave.

It is every litigant's right to appeal to the highest court in the land. The purpose of an appeal to a higher court is so that an error committed by the lower court is corrected: see

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[7] 1993 (1) SA 523 (A)
[8] 1996 (1) ZLR 341 (S)
[9] 1996 (3) SA 686 (AD)
[10] 1998 (1) ZLR 1 (H)
[11] At p 690C - F
[12] 1944 CPD 108, at pp 111 - 112
[13] At 549 - 551

*Pretoria Garrison Institutes v Danish Variety Products*[14]. In terms of s 169(1) of the Constitution of Zimbabwe, the Supreme Court is the final court of appeal in Zimbabwe, except for constitutional matters. But in certain situations the right of appeal is removed or restricted. Certain matters are simply not appealable. Others are appealable only with the leave of the court from which, or the judicial officer from whom, the appeal lies. The rationale for proscribing or limiting the right of appeal in certain situations was given by SCHREINER JA in the *Pretoria Garrison* case above. At p 867 the learned judge of appeal said:

> "A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. This latter consideration has, I imagine, been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle. The chief object has naturally been to bring about a just and expeditious decision of a major substantive dispute between the parties. …….. But desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable."

*In casu*, the respondent argued that in spite of the order of NDEWERE J being interlocutory, and therefore being one generally not appealable without leave, nonetheless it had proceeded to appeal against it without leave because this is permissible in terms of s 43(2)(d)(ii) of the High Court Act. The respondent argued that the provisional order was an interdict. One does not need leave to appeal against the grant or refusal of an interdict.

Section 43(2) of the High Court Act reads as follows:

"(2) No appeal shall lie-
- (a) …….
- (b) …….
- (c) …….
- (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases-
  - (i) where the liberty of the subject or the custody of minors is concerned;
  - (ii) **where an interdict is granted or refused**;
  - (iii) in the case of an order on a special case stated under ……"

[14] 1948 (1) SA 839, at p 867

The structure of s 43 of the High Court Act as a whole is such that it begins, in subsection (1), by granting a blanket right of appeal to the Supreme Court in all civil cases from any judgment of the High Court, but subject to what the rest of the section says. The rest of the section, in subsection (2)(a) to (c), takes away altogether the right of appeal in the situations specified therein. For example, no appeal lies from an order of the High Court given by consent of the parties; or from an order refusing summary judgment. Then in subsection (2)(c)(ii) and (2)(d) the right of appeal is restricted. Leave is required in the situations specified therein. An interlocutory order or judgment given by a judge is not appealable unless with the leave of the judge who granted it or, where he has refused that leave, with the leave of a judge of the Supreme Court. But even in these situations, there are exceptions. The grant or refusal of an interdict is one such. No leave is required to appeal.

Against the clear provisions of s 43(2)(d)(ii) of the High Court Act, *Adv. Matinenga's* argument was that the court was not precluded from deciding whether a particular interdict was purely interlocutory, the grant or refusal of which would necessitate leave to appeal, or one with a final or definitive effect, the grant or refusal of which would require no leave.

I do not agree. The section is very clear. It does not refer to just an interdict. It expressly and unequivocally refers to the **grant** or **refusal** of an interdict. HERBSTEIN AND VAN WINSEN *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*[15] note from case authorities that the grant of an interdict *pendente lite*, though causing great, and indeed, irreparable prejudice, clearly does not dispose of any issue or any portion of it in the main suit. The grant of such interdict is appealable only with leave. But the refusal does not require leave.

In *Loggenberg v Beare*[16] and *Davis v Press & Co*[17] it was held that the interdicts *pendente lite* granted by the magistrates' courts were not definitive and therefore not appealable. The two judgments were interpreting a provision in the then Magistrate's Court Act of South Africa *almost* similar to s 43(2)(d) of our High Court Act. The South African provision said in part:

> "… a party to any civil suit or proceeding in a Court may appeal … against … any rule or order made in such suit or proceeding and having the effect of a final and definitive sentence, including any order as to costs."

[15] 5th ed.
[16] 1930 (2) TPD 714
[17] 1944 CPD 108

But there is a world of difference between that provision and s 43(2)(d)(ii) of the High Court Act. The South African provision referred to any rule or order made in a suit having the effect of a final and definitive sentence. On the other hand, s 43(2)(d)(ii) of the High Court Act is very specific. It refers to **the grant** or **refusal** of an interdict.

The major reason why I felt that the case being argued before me was not really the one I had to make a decision on was that the applicants' application was not, as I eventually figured it out, about interdicts *per se*. In a broad sense, to grant or refuse a stay of execution is to grant or refuse an interdict. An interdict is an injunction. It is a remedy by a court, either prohibiting somebody from doing something (prohibitory interdict), or ordering him to do or carry out a certain act (mandatory interdict): see Oxford Quick Reference Dictionary of Law[18] and HERBSTEIN AND VAN WINSEN, *supra,* at p 1455.

But in my considered view, the focus of s 43(2)(d)(ii) of the High Court Act is not about applications for stay of execution as a species of an interdict. Otherwise every order of court, for instance, one directing someone to pay another a sum of money, would always be an interdict. The distinction between ordinary interdicts and stays of execution in particular is more apparent when one considers the separate requirements for each remedy. With an interdict, the applicant must show a clear right in his favour, or, in the case of an interim interdict, a *prima facie* right having been infringed, or about to be infringed; an apprehension of an irreparable harm if the interdict was not granted; a balance of convenience favouring the granting of the interdict, and the absence of any other satisfactory remedy: see *Setlogelo* v *Setlogelo*[19]; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board*[20]; *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor*[21]; *Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor*[22] and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor*[23].

On the other hand, in an application for a stay of execution the requirements are **real and substantial justice**: see *Cohen v Cohen*[24]; *Chibanda v King*[25]; *Mupini v Makoni*[26] and

[18] 8th ed. at p 322
[19] 1914 Ad 221
[20] 1996 (1) ZLR 289 (SC)
[21] 1997 (1) SA 391 (A)
[22] 1980 ZLR 378
[23] 2000 (1) ZLR 234 (H)
[24] 1979 (3) SA 420 (R)

*Muchapondwa v Madake & Ors*[27]. The premise on which a court may grant execution pending appeal is the inherent power reposed in it to control its own process. In *Cohen's* case above GOLDIN J said[28]:

> "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." (my emphasis)

In my view, the requirements for an application for a stay of execution, admittedly a species of an interdict, are less onerous than those for an ordinary interdict. *In casu*, justice would turn on its head if I did not grant the substantive relief sought by the applicants. The sole object of the provisional order by NDEWERE J on 21 April 2015 was undoubtedly to preserve the status quo *ante* so as to allow for the determination of the application for rescission of the default judgment. The learned Judge obviously considered that **real and substantial justice** would be achieved by granting a stay of execution. She most probably considered that allowing execution in the face of an application for rescission of judgment would render any judgment in favour of the applicants in that application a *brutum fulmen*. In the application before me, the respondent is now saying, in effect, by the appeal stratagem, NDEWERE J's order was suspended and that therefore the way has been opened for it to proceed with execution. But if that were to happen, not only would any judgment in favour of the applicants in the application for rescission be rendered *brutum fulmen*, but also the object of the provisional order by NDEWERE J would be rendered nugatory. That, to me, is manifestly intolerable.

It is for the above reasons that I hereby grant the order for stay of execution. The interim relief shall read:

> "**INTERIM RELIEF GRANTED**
>
> The execution of the writ issued by the first respondent pursuant to a default judgment obtained by it in HC 11024/14 is hereby suspended pending the determination of the appeal filed by the respondent in the Supreme Court under SC 297/15 against the judgment of this court in HC 1922/15."

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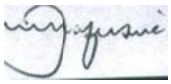
[25] 1983 (1) ZLR 116 (SC)
[26] 1993 (1) ZLR 80(S)
[27] 2006 (1) ZLR 196 (H)
[28] At p 423B –C

There is one last point. In the applicant's papers, and during argument, the applicant deprecated the conduct of the respondent's legal practitioner and pressed strongly for an order of costs on an attorney and client scale, and *de bonis propriis* against him. However, the prayer for costs, and at such a scale is one of the remedies sought on the return day as part of the final relief. Accordingly, I make no order as to costs.

20 July 2015



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