LAMB DISTRIBUTORS (PVT) LTD
versus
ALLIED TIMBERS (PVT LIMITED

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 14 May 2018 & 20 June 2018

Opposed Matter

S. Mubvuma, for the applicant
R.E. Nyamayemombe, for the respondent

MUZOFA J: On 14 May 2018, I delivered an *ex tempore* judgment dismissing the application by the applicant.

On 21 May 2018 the applicant's legal practitioners requested for reasons, these are they.

This matter came as an opposed application for correction of an order in terms of order 49 r 449 of the rules of this court. The order sought to be corrected ordered that:

> "The defendant shall pay the plaintiff the sum of $52 982 together with interest thereon at the rate of 5% per annum from the date of this judgment to the date of payment, plus a third (1/3) of the plaintiff's costs of suit."

Before the matter was argued on the merits, a preliminary point was raised for the respondent.

It is trite that a preliminary point, if properly taken in an application or action, it is capable of disposing of a matter without the need for the court to proceed into the merits of the case.

Mr *Nyamayemombe* for the respondent submitted that, the judgment between the parties was issued by this court on 25 January 2017 under HH 42/17. The respondent noted an appeal against the judgment under SC 75/17. The appeal is still pending before the Supreme Court.

The appeal suspended the judgment by this court by operation of law. Also that this court had become *functus officio* and may not make further orders with regard to the matter. Further that the application infringes the respondent's constitutionally enshrined right of appeal.

For the applicant it was submitted that an appeal to the Supreme Court only suspends execution of the judgment and not correction. That this court is not *functus officio* in terms of r 449, since it gives the court a discretion to revisit its judgment. Further that there is no constitutional provision which gives the respondent the right to appeal in a civil matter, therefore no constitutional right has been infringed.

It is a general principle of law that where a court has pronounced a final judgment or order it becomes *functus officio*, it has no authority to alter or supplement it. This is because the court has fully exercised its jurisdiction over the subject matter.

The rules of the court have however made inroads into this principle, in terms of order 49 r 449 the exceptions to the rule are set out.

The court can therefore exercise its discretion and alter or vary its order in terms of the said rule.

The issue for determination *in casu* is whether an order that is an appeal is subject to r 449?

In *Mushaishi* v *Lifeline Syndicate and Anor* 1990 (1) ZLR 284 (HC) the court held that the High Court will not entertain matters which are sub *judice* the Supreme Court.

In *Mabwe Minerals Zimbabwe (Pvt) Ltd* v *Chiroswa Minerals and 4 Ors* HH 56/14 CHIGUMBA J dealt with similar circumstances only that the request was to rescind judgment, the learned judge noted, at p 8 of the cyclostyled judgment.

> "Clearly, the court cannot as a matter of procedure, purport to correct, vary or rescind the judgment while it is pending appeal before the Supreme Court. The operation of the order has been suspended. A superior court is now seized with it.
>
> There is no basis on which this court can purport to deal with such a judgment, and r 449 does not in any way confer us with power to set aside a judgment that is the subject matter of an appeal, on the basis that it was erroneously sought or obtained. To rescind judgment in chambers on an urgent basis in this circumstance would be turning our rules of procedure on their head, and ill conceived."

In *Econet Wireless* v *Dardale Investments and Anor* 2014 (2) ZLR 662(HC) and *Dicron Investments* v *Eliphas Kawa and 4 Ors* HH 129/17 the court took the same approach, to decline intervening in a matter that is subject of an appeal to the higher court.

It is clear that the approach by the courts is that once an appeal is noted is not possible to vary the order in terms of r 449.

Mr *Mubvuma*'s submission though persuasive it remains unsupported. He argued that suspension of the order by virtue of an appeal relates to execution only. This is the common

law position and has been embraced in our jurisdiction. In *casu*, he went on it is a mere arithmetic correction that is required, it has no effect on the merits of the case and execution.

It is axiomatic that the correction is meant to capture what the applicant believes is the correct figure, so that in the event of execution, the order has correct figures. At the end of it all, this correction speaks to execution.

Mr *Mubvuma* sought to distinguish the cases relied on for the respondent in that they related to setting aside of the judgment yet *in casu* it is just an arithmetic correction.

I do not agree with the submission. The principle is based on the fact that, the rules do not extend the power of the court in terms of r 449 to judgments that are sub *judice* the Supreme Court.

I do not read the cases to make a distinction as to the nature of the intervention that this court intends. The nature of the variation is irrelevant, the principle is that, once the judgment is pending appeal it ceases to be in the realm of the High Court to vary, rescind or correct such judgment.

This is because it is now before a superior court for determination.

I was not referred to any case law that support Mr *Mubvuma*'s interpretation of the case law.

It therefore follows then that noting an appeal to the Supreme Court suspends execution of the order and also suspends the right to vary, correct or rescind the order in terms of r 449.

To that extent the respondent's submission is meritorious

In respect of the point that the court is *functus officio*, it was submitted that the issue on the calculation or amount which the applicant was entitled to is at the centre of the appeal. In view of that fact, the correction of the judgment would be prejudicial to the respondent.

It is my considered view that this issue as placed before the court, delves into the merits of the case. The overarching issue is whether there is indeed a miscalculation that is common to the parties?

This is the substance of the application and cannot be disposed as a preliminary issue.

The third issue is whether the application infringes on the respondent's constitutional right to appeal.

This point was not developed further, the court will treat it as abandoned.

From the foregoing, clearly the preliminary point succeeds.

Mr *Mubvuma* also submitted that in the event that the preliminary point is upheld, the court should not dismiss the application but postpone the matter *sine die* since the merits were not considered.

It is not in dispute that the applicant filed this application after the appeal had been noted. The applicant was aware of the case law as cited for the respondent but opted to proceed despite the clear position of the court in such cases.

The applicant cannot plead for the court to wait for the outcome of the appeal by postponing the matter *sine die*.

The effect of the finding on the preliminary point is that the court cannot deal with matter when it is before the Supreme Court. The only appropriate order is dismissal. The applicant took a chance when it could have waited until the determination of the appeal. It has itself to blame.

From the foregoing, the following order was therefore made.

1. The preliminary point be and is hereby upheld
2. The application is dismissed with costs.

Mtetwa & Nyambirai, applicant's legal practitioners
Muvingi & Mugadza, respondent's legal practitioners