REPORTABLE (28)

MINISTER OF HIGHER AND TERTIARY EDUCATION

v

(1) BMA FASTENERS (PRIVATE) LIMITED
(2) MASTER OF THE HIGH COURT, BULAWAYO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GOWORA JA & MUTEMA AJA
BULAWAYO, JULY 28, 2014

L Nkomo, for the appellant

V Majoko, for the first respondent

No appearance for the second respondent

CHIDYAUSIKU CJ: On 28 July 2014, after hearing counsel and having gone through the papers filed of record, we gave the following order:

"**IT IS ORDERED THAT:**

The matter be and is hereby struck off the roll. Costs will follow the cause."

Upon giving the above order, we indicated that reasons for the order were to follow. These are they.

On 4 July 2013 the appellant filed in the court *a quo* a Chamber application for leave to execute and institute proceedings against the first respondent. In that application the appellant sought the following relief from the court *a quo*:

"**IT IS ORDERED THAT**:

1. That the applicant be and is hereby granted leave to execute against the first respondent's attached 800 harrows.

2. The applicant be and is hereby granted leave to litigate and issue out any court action or process against the first respondent for any further outstanding levies due in terms of section 3 of the Manpower Planning and Development (Levy) Notice, S.I. 74/99, and any such surcharge imposed for the period starting from August 2011 to current.

3. That the first respondent and the second respondent, Christopher Maswi, personally *de bonis propriis* pay costs of this application at the attorney-client scale, jointly and severally, the one paying the other to be absolved."

The first respondent opposed the application launched by the appellant in the proceedings *a quo* and in so doing the first respondent raised two preliminary points against the appellant. The first point *in limine* was that the appellant had used the wrong form of the application and therefore there was non-compliance with the rules of the court *a quo*. The second issue raised was that the person who deposed the founding affidavit to the Chamber application lacked the requisite authority to institute proceedings in the court *a quo* on behalf of the appellant.

The learned judge *a quo* agreed with the first respondent that the Chamber application that had been filed was defective for want of compliance with the rules of the High Court. The learned judge *a quo* also made a finding to the effect that the person who had deposed the appellant's founding affidavit lacked the requisite authority to do so on behalf of the appellant. The learned judge proceeded to dismiss the application, without delving into the merits of the matter.

Aggrieved by the decision of the learned judge *a quo* to dismiss the application, the appellant noted its appeal to this Court on grounds which I summarise as follows –

1. That the court *a quo* had erred by holding that the Chamber application was fatally defective for want of compliance with the correct form, when such finding is not supported by the High Court Rules, 1971;

2. The court *a quo* erred by holding that there was no proof before the court to establish that the deponent of the founding affidavit was authorised to depose the affidavit by the Minister of Higher and Tertiary Education. That finding was not supported by the evidence before the court;

3. The court *a quo* erred by holding that it was the deponent of the founding affidavit who was litigating on behalf of the Minister of Higher and Tertiary Education when in fact the applicant on the papers is the Minister as provided in s 54(4) of the Manpower Planning and Development Act [*Chapter 28:02*];

4. The court *a quo* erred by holding that the Permanent Secretary could not delegate authority to sue even if it were proved that he was himself properly authorised. That finding is contrary to the provisions of s 62 of the Manpower Planning and Development Act.

The relief which the appellant sought from this Court was the setting aside of the order of the court *a quo* and the substitution thereof with the following:

> "1. That the points *in limine* raised by the first and second respondents are dismissed with costs.
>
> 2. The parties must proceed to address the Court on the merits of the Chamber application.
>
> 3. The first and second respondents to pay the costs of suit in this appeal."

In heads of argument filed of record by the first respondent, the first respondent took a preliminary point that the appellant had not sought leave of the court *a quo* to appeal against the decision of the court *a quo*. The first respondent's stance was that since the decision of the court *a quo* was an interlocutory order, such an order could only be appealed against with leave of the court *a quo* or with leave of a judge of this Court, that is, in the event of the court *a quo* refusing to grant the appellant such leave. The first respondent's submission was premised on the provisions of s 43 of the High Court Act [*Chapter 7:06*] (hereinafter referred to as "the Act").

This submission by Mr *Majoko* cannot but be correct, given the explicit language of *s* 43(2)(d) of the Act, which provides that:

> **"43 Right of appeal from High Court in civil cases**
>
> (1) …
>
> (2) No appeal shall lie —
>
> (*a*) – (*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 any law relating to arbitration."

Quite clearly, s 43 of the Act provides for the need to obtain the leave of the court *a quo* to appeal against an interlocutory order. Section 43 of the Act admits of no other interpretation.

Mr *Nkomo*, for the appellant, in his argument sought to convince the Court that there was no need to seek leave because the matter it brought before the court *a quo* was not for an interlocutory order but a culmination of other proceedings. Therefore there was no need for it to return to court seeking the same relief. We were not persuaded by this submission. Counsel's submission in this regard is not consistent with the clear meaning of s 43 of the Act.

What constitutes an interlocutory order was enunciated in the case of *Blue Rangers Estates (Pvt) Ltd v Muduviri and Anor* 2009 (1) ZLR 368 (S). In that case MALABA DCJ explained the correct test to be applied in determining whether an order/judgment is final and definitive or is interlocutory and not appealable without leave. The learned DEPUTY CHIEF JUSTICE had this to say at 376G:

> "To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court." (the emphasis is mine)

The learned DEPUTY CHIEF JUSTICE continued at 379:

> "Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge." (the emphasis is mine)

Applying the above legal principle to the order that was awarded by the court *a quo*, the following conclusion is inevitable. The learned judge in the court *a quo* dismissed the appellant's application. The effect of the order was that execution could not proceed. Interdicting one action does not finally determine the issues or cause of action between parties. The issues between the parties could only be determined by the appeal court.

Turning to para 2 of the order which the appellant was seeking in the court *a quo,* I am satisfied that it was interlocutory in nature and its dismissal did not bring finality to the matter.

The appellant ought to have sought leave from the court *a quo* to appeal against its judgment.

In this regard, the remarks of CORBETT JA in the case of *South Cape Corp.* v *Engineering Management Services* 1977 (3) SA 534 (AD) at 551G are pertinent. He had this to say at 551G:

> "Next, the question is whether an order for leave to execute is a simple interlocutory order or an interlocutory order having a final and definitive effect on the main action. If the test laid down in the *Pretoria Garrison Institutes* case (*Pretoria Garrison* Institutes v *Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 [AD]) be applied, then, in my view, it must be held to be a simple interlocutory order. It does not dispose of any issue or any portion of the issue in the main suit, nor does it irreparably anticipate or preclude any of the relief which might be given at the hearing (taking the 'hearing' in such a case to be a hearing of the appeal). It leaves the Court of Appeal free to make whatsoever decision it deems fit in the main action."

This passage supports my reasoning that the order of the court *a quo* was interlocutory in nature.

In the result, we concluded that in the absence of leave to appeal the matter was not properly before the Court and should be struck off the roll with costs following the result.

GOWORA JA: I agree

MUTEMA AJA: I agree

Dube-Banda, Nzarayapenga & Partners, appellant's legal practitioners

Majoko & Majoko, first respondent's legal practitioners