<u>REPORTABLE</u> **(42)**

AL SHAMS GLOBAL BVI LIMITED
v
(1) DEPOSIT PROTECTION CORPORATION (2) KIITUMETSI ZAWANDA (3) EQUITY PROPERTIES (PRIVATE) LIMITED (4) REGISTRAR OF DEEDS N.O.

SUPREME COURT OF ZIMBABWE
MATHONSI JA, KUDYA JA & MUSAKWA JA
HARARE: 17 MARCH 2022 & 23 MAY 2022

L. Uriri, for the appellant

S. Moyo, for the first and second respondents

Ms *F. Mahere*, for the third respondent

No appearance for the fourth respondent

MATHONSI JA: On 4 November 2021 the High Court ("the court *a quo*") struck off the roll with costs on a higher scale an urgent application filed by the appellant for an order directing the third respondent to forthwith surrender to the fourth respondent a replacement deed of transfer number 9068/2008 and barring the third respondent from using such replacement deed of transfer in lieu of the original on the pain of costs on the adverse scale.

This appeal is against that striking off judgment which the appellant would like to have set aside and substituted with the substantive relief it unsuccessfully sought in the court *a quo*.

BACKGROUND FACTS

The facts relevant to the resolution of this appeal are largely common cause. The first respondent is the liquidator of Interfin Banking Corporation, ("Interfin") which is undergoing final liquidation. The second respondent is the company secretary of the first respondent whom the appellant elected to join as a party to the proceedings in her personal capacity for unclear reasons.

The third respondent is the owner of certain immovable property known as Lot 3 of Bannockburn, Harare which it holds by Deed of Transfer Number 9068/2008. As security for a debt owed to Interfin, the third respondent surrendered its title deed to Interfin which registered Mortgage Bond No.5818/2011 on the title deed.

In turn, Interfin obtained certain sums of money from the appellant which it secured by the third respondent's title deed surrendered to the appellant. Since then the appellant has tenaciously held onto the title deed in question despite demand for its release made by the liquidator in the discharge of its duties as such.

Indeed, the liquidator was constrained to demand the surrender of the title deed after the third respondent acquitted all its indebtedness to Interfin, the company in liquidation, thereby obliging the liquidator to cancel the mortgage bond. Following the repayment of the loan, the liquidator was also obliged to hand the title deed over to the third respondent.

Bereft of any sense of solution, the liquidator applied for a replacement title deed from the Registrar of Deeds, the fourth respondent herein.

The fourth respondent acceded to the application and issued a replacement title deed on 7 September 2021. That triggered the present litigation. The appellant moved swiftly and filed an urgent application for a *mandamus* on 13 October 2021. As I have said, it sought in the interim, the immediate surrender to the fourth respondent of the replacement title deed and the barring of the third respondent from using it for whatever purpose.

The basis of the application was that, not only were the respondents aware that the appellant was in possession of the original title deed, the third respondent was selling properties to individuals using the replacement title deed. According to the appellant, the third respondent's conduct was causing irreparable damage and undue hardship to it by dissipating the immovable property.

The application was opposed by the first, second and third respondents. They raised a number of preliminary objections, chief among which were the failure of the appellant to obtain leave of the court to sue the first respondent, the liquidator of a company in liquidation and the misjoinder of second respondent in her personal capacity.

The court *a quo* found that the application was improperly before it by reason that no leave to sue had been sought and obtained before embarking on litigation. In arriving at that

conclusion the court *a quo* followed the case of *Chikura N.O & Anor v Alshams Global BVI Ltd* SC 23/20 in which this Court remarked at p 6-7:

> "As correctly observed in part by the court *a quo*, leave of the court is required before proceeding against a company and/or bank in liquidation. This is so because the broad purpose of the law of insolvency and the winding up of companies is to ensure due distribution of the insufficient assets of the debtor company amongst the competing creditors under the watchful eyes of the court. Thus, the position is settled at law that an order placing an estate or a company in liquidation has the effect of creating a *concursus* of the creditors of the insolvent and no creditor can thereafter do anything that will alter the rights and interests of other creditors without the leave of the court. Unsupervised and unsanctioned litigation and proceedings against the insolvent will disturb the due distribution of the insufficient assets and remove the role of the court from the process.
>
> It may also be added that the leave of the court is necessary in such circumstances as a broader consideration of protecting the economically fragile company from unnecessary litigation quite apart from merely protecting the interests of the creditors.
>
> It being common cause that leave of the court was not sought and obtained prior to the institution of the proceedings *a quo*, the appeal succeeds on this basis alone."

Indeed, as in the present case, the respondent in that case had sued the liquidator of Interfin without the leave of the court. It argued that the cause was not against the Bank but was against the liquidator as an administrative authority under the Administrative Justice Act [*Chapter 10:28*].

The court *a quo* refused to be drawn to consider the merits of the application. It reasoned at para 20 of its judgment:

> "There are set procedures that are followed by a creditor to recover a debt from a company under liquidation. Leave to sue is necessary for a party to show the court why its particular case needs a suit outside the normal procedures that are there for recovering a debt by creditors through the appointed liquidator. It is the court that is tasked with assessing the merits of any application including its prospects of success based on the sufficiency of evidence placed before it. Indeed it would have been under such an application for leave to sue that an issue such as that raised by respondents herein that the company is not

> registered locally would have been considered under prospects of success in determining whether or not that leave to sue should be granted."

THE APPEAL

The appellant was thoroughly disgruntled by that outcome. It launched this appeal on 6 grounds including an attack on the conclusion of the court *a quo* that leave to sue was required. Although there are multiple grounds the issue for determination is very narrow indeed. It is whether there was need for leave to be sought and obtained before filing the application against the liquidator.

I should add that prior to the date of hearing of the appeal, the first and third respondents gave notice of objections in terms of r 51 of the Supreme Court Rules, 2018. After hearing counsel on the objections, this Court requested to be addressed on the merits while parking its decision on the preliminary objections.

This was done in the interest of expediency to avoid reconvening again depending on the outcome of the preliminary objections. Accordingly, with the consent of the parties, the court heard the merits of the appeal on the understanding that they will only be related to in the event of the preliminary objections not being upheld.

I proceed therefore to consider those objections. Mr *Moyo* for the first and second respondents premised his objections on 3 points.

First, counsel submitted that the judgment of the court *a quo* sought to be impugned, to the extent that it merely struck the applicant's application off the roll for want of leave to sue the liquidator, is not appealable at all. It does not meet the requirements of a judgment that can be appealed against.

In advancing that argument reliance was placed on two South African authorities. The first is the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) which set out three attributes of an appealable judgment. These are that;

i. the decision must be final in effect and not susceptible to alteration by that court;
ii. it must be definitive of the rights of the parties by granting definite and distinct relief; and
iii. it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.

The first and second respondents' case is that none of the foregoing three requirements of an appealable judgment exist in the impugned judgment because the court *a quo* deliberately refrained from delving into any of the merits of the dispute. Instead it was content to strike off the application on the basis that leave was not obtained. The court *a quo* will still determine the merits once leave is obtained.

The other authority cited by Mr *Moyo* is *Pretoria Garrison Institutes v Danish Variety Products* 1948(1) SA 839(A) at p 867 where the following remarks were made:

> "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 underlining is for emphasis).

Contesting that preliminary objection, Mr *Uriri* for the appellant submitted that whenever there is a sentence or judgment of the court that a litigant is unhappy with, there is a right to appeal. In counsel's view, it would be a sad day indeed, were certain matters be made to end at the court *a quo* without testing their correctness on appeal.

Second, Mr *Moyo* submitted that the judgment of the court *a quo* that the application was improperly before it for want of leave to sue the liquidator and therefore striking it off the roll, was interlocutory in nature. For that reason, so it was argued, it could not be appealed without the leave of the court *a quo*. In counsel's view, the striking off of the application was merely a procedural step which at best was merely interlocutory. To that extent, any challenge of the judgment is regulated by s 43(2) of the High Court Act.

Ms *Mahere* for the third respondent also took a similar preliminary objection based on absence of leave to appeal. She submitted, associating herself fully with submissions made on behalf of the first and second respondents, that for all intents and purposes, the striking off was interlocutory. Counsel maintained that, the appeal is improperly before the court because leave to appeal was not sought.

In addition, Ms *Mahere* urged the court to take judicial notice of proceedings instituted by the appellant in case number HC 6264/21. According to counsel, it is an application, exactly the same as the one forming the basis of this appeal, brought by the appellant after its initial application was struck off the roll. It seeks the same relief, except that in it the appellant did not join the executor and its company secretary.

It was submitted that this was a clear case of preemption. The right of an unsuccessful litigant to appeal, it was argued, is preempted when that litigant, at the same time, complies with the judgment. By filing the same application without citing the first and second respondents, the appellant should be taken as having accepted the correctness of the judgment *a quo*.

In response, Mr *Uriri* did not directly address the question whether the judgment was interlocutory and therefore requiring leave of the court *a quo* before an appeal could be noted. He submitted that in the body of the judgment, the court *a quo* commented on the merits of the matter. For that reason, the court is at liberty to entertain the appeal even though leave was not sought.

In making that argument, Mr *Uriri* relied on the case of *Portland Holdings Ltd v Tupelostep Investments (Pty) Ltd & Anor* SC 3/15 in which an application was adjudged by the court *a quo* as not urgent. The court *a quo* had however gone on to dismiss the application instead of striking it off the roll to enable the applicant therein, if it so wished, to proceed with the application as an ordinary application.

Apart from that, the court *a quo* had also made several comments on the merits of the matter and also overlooked most of the relevant evidence pointing to the urgency of the application. This Court was clear that "the matter ought to have been dealt with on the basis of urgency." Taking all the mistakes made *a quo* into account and that the appeal court was in as good a position as the court of first instance to determine the matter and substitute its own discretion, this Court allowed the appeal. It granted the relief sought in the application.

Mr *Uriri* urged of this Court the adoption of the same approach because the court *a quo* in the present case also made comments on the merits of the matter. He submitted that this Court should grant the full relief sought *a quo* even though the court *a quo* did not relate to the merits or the relief sought.

Regarding preemption, it was submitted on behalf of the appellant that its grief with the judgment *a quo* was recorded in the notice of appeal filed in this Court. In counsel's view, the fact that subsequent to the filing of that notice of appeal, the appellant saw it fit to return to the court *a quo* with another application did not signify satisfaction with the judgment appealed against.

This is so, so the argument goes, because the parties in the subsequent application are different from those in the present matter.

ANALYSIS

Regarding the issue whether the judgment of the court *a quo* is appealable, my view is that the procedure for appealing in this jurisdiction is heavily regulated. As shall become apparent shortly, even the orders of the nature of the one which is the subject of the present appeal, are regulated by statute. As such, if the legislature intended to constrain any right of appeal it would have said so in specific terms.

Indeed, even the authority relied upon by Mr *Moyo*, *Pretoria Garrison Institutes*, *supra*, presupposes that the restrain from appealing certain court orders has to be imposed by the law-giver before the right of appeal can be restricted or prohibited. I am therefore not persuaded by the first leg of the first and second respondents' preliminary objection. It is accordingly rejected. In my view, that position accords with the constitutional right of access to the courts for the resolution of any dispute enshrined in s 69(3) of the Constitution.

The question whether the judgment *a quo* is interlocutory or not is central in the resolution of the second leg of the preliminary objection. Section 43(2) of the High Court Act [*Chapter 7:06*] governs appeals against interlocutory judgments or orders. It provides:

> "(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 any law relating to arbitration."

There is little doubt that the phrase "interlocutory order" is one that has vexed the legal mind for a considerably long time. Its definition has eluded the courts but there is a very helpful discussion of it by DEVITTIE J in *Mwatsaka v ILC Zimbabwe* 1998 (1) ZLR 1(H) where the learned Judge reviewed a number of authorities discussing the phrase "interlocutory orders."

He referred to the reasoning of CORBETT JA (as he then was) in *South Cape Corp* v *Engineering Management Services* 1977(3) SA 534 (A) at 549 where the court remarked:

> "I think, nevertheless, the general effect of this series of decisions, together with consistent judgments of other courts, may be summarized as follows:-
>
> (a) In the wide and general sense, 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. But orders of this kind are divided into two classes:
> (i) Those which have a final and definitive effect on the main action, and ,
> (ii) Those known as simple (or purely) interlocutory orders proper, or 'interlocutory orders proper' which do not (see generally *Bell v Bell* 1908 T S 887 at p 890, *Steytler NO. v Fitzgerald supra* at pp 303, 311, 325-6, 342, *Globe & Phoenix Gold Mining Co. Limited vs Rhodesian Corp Ltd* 1932 AD 146 at pp153)."

The court went on at p 8 C, relying on the authority of the *Pretoria Garrison* case, *supra*, to make the point that the test as to whether an interlocutory order is one which is preparatory or procedural and therefore not appealable unless it is such that it disposes of any of the issues or any portion of the issue in the main action or suit or it irreparably anticipates or precludes some of the relief which would or might be given at the hearing.

As stated in *Mwatsaka, supr*a, those interlocutory orders which do not meet the criteria of non- appealable orders set out in *Pretoria Garrison*, *supra,* are termed simple interlocutory and are appealable with leave in terms of s 43(2) of the High Court Act.

It occurs to me that the order striking off the appellant's application from the roll was interlocutory in the sense that it did not determine any issue which was the subject of the main suit. It was, however, appealable in the sense that it brought the entire edifice of the application to a screeching halt.

The application would not proceed any further until such time that the appellant sought and was granted leave to sue. The judgment left the entire dispute unresolved. While the appellant was seeking an interdict, the interdict was neither granted nor refused thereby disqualifying the matter from one of the exceptions to the requirement for leave to appeal to be sought.

It being an interlocutory judgment or order which did not fall under any of the exceptions set out in para (d) of s 43 (2), it means that leave should be sought and obtained from the *judge a quo*, or a judge of this Court before an appeal can be brought to this Court.

On the issue of preemption raised by Ms *Mahere*, while it is correct that generally the court is always entitled to make reference to its own records and proceedings (See *Mhungu v Mtindi* 1986 (2) ZLR 171 (S)) and it is not disputed by the appellant that it filed another application which excluded the first and second respondents, my view is that the issue was raised mainly to buttress the objection on the need for leave. In addition, it was relied upon to justify the prayer for costs on the adverse scale.

Having arrived at the conclusion that leave of the court was required to lodge the appeal, I find it completely unnecessary to engage the aspect of preemption beyond what I have done. Clearly, it does not change the fact that the appeal is improperly before the court.

DISPOSITION

The judgment or order striking off the application by reason of the failure of the appellant to obtain leave to sue the liquidator of Interfin, a company in liquidation, was interlocutory in nature. The court *a quo* summarized the respective positions of the parties but simply did not engage the merits at all. It left all the issues in dispute unresolved and it is open to the court *a quo* to engage and determine all the issues once leave to sue has been sought and granted.

The nature of the judgment or order in question is such that it does not meet the criteria of a non-appealable judgment or order. While it is a simple interlocutory judgment or order it is appealable but only with leave as required by s 43(2)(d) of the High Court Act. Such leave not having been sought and granted it was incompetent for the appellant to purport to appeal to this Court. As a corollary to that, the matter is improperly before the court. It ought to be struck off the roll.

Regarding the issue of costs, both Mr *Moyo* and Ms *Mahere* urged the court to grant costs in favour of the respondents on the adverse scale of legal practitioner and client. While such costs only commend themselves as a seal of the court's disapproval of a litigant's conduct, I am in agreement that they are indeed justified in the circumstances of this case.

The appellant is what in criminal procedure is referred to as "a repeat offender" who has disregarded, not only the procedure for seeking leave more than once, but also trashed the advice of this Court. It has doggedly stuck to its habit of approaching the court without leave despite the decision of this Court in an earlier case that it brought. In *Chikura N.O* & *Anor v Alshams Global BVI Ltd*, *supra*, the appellant sued the liquidator without leave. This Court advised it that leave to sue was required.

Notwithstanding that, and without commenting on the propriety of the judgment of the court *a quo* that leave to sue was again necessary in the appellant's second approach to the court, it is clear that the appellant again sued the same liquidator without first seeking leave.

Having been reminded of the need to seek leave by the court *a quo*, the appellant again purported to file the present appeal without leave. In my view, a conscientious litigant would have been more circumspect and proceeded with caution. Yet, despite the clear provisions of s 43(2)(d) of the High Court Act that leave was required, the appellant again lodged an appeal without seeking leave to appeal.

By so doing it invited the sanction of the court by the only weapon available to it, the grant of costs on the higher scale, so that in future the appellant will proceed with caution.

In the result, it is ordered as follows:-

1. The matter is struck off the roll.
2. The appellant shall bear the costs on a legal practitioner and client scale.

KUDYA JA: I agree

MUSAKWA JA: 1 agree

Atherstone & Cook, appellant's legal practitioners

Scanlen & Holderness, 1st and 2nd respondent's legal practitioners

Chambati, *Mataka & Makonese*, 3rd respondent's legal practitioners