RAJENDRAKUMAR JOGI
Versus
BULCHIMEX GMBH IMPORT EXPORT
And
CHEMIKALEN und PRODUCKTE
And
REGISTRAR OF DEEDS
And
SHERIFF OF ZIMBABWE N.O.

HIGHCOURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE 16 November 2022 & 8 February 2023

Opposed Application

D Sanhanga, for the applicant
S Banda, for the respondents

BACHI MZAWAZI J: This is a contested application for leave to execute pending Appeal. In brief, there has been an ongoing legal battle between the applicant and first respondent over an immovable property, stand 295, Northwood Township 2 of Submenu, measuring 4049 square meters. The second and third respondents are only cited in their official capacities.

Applicant claims that he fully purchased the property from the respondents, sometime in 2013, but is being precluded from having undisturbed enjoyment of the same by the first respondent. First Respondent, on the other hand, is challenging the sale as fraudulent and unsanctioned, as he has always been a *peregrinus* and did not authorize his designated agent to sale. In fact, he alleges that the signatures on the agreement of sale are the main source of dispute, with handwriting experts from abroad coming to testify on that aspect.

As a result, sometime in 2017, applicant obtained a default judgment, in case HC2972/17, against the respondents after instituting an action compelling transfer of the said property.

In 2018, the respondent successfully rescinded the judgment. The matter was subsequently set down after several failed attempts due to the first respondent's *peregrinus* status. When the matter was eventually set down for the 23rd of February 2022, a postponement was sought and turned down, after the local representative, by power of attorney of the first respondent failed to turn up but, in his stead, his legal team comprising of the instructing counsel and their advocate. The trial court proceeded to issue judgment after hearing the plaintiff's evidence in terms of rule 56(1) of the High Court Rules, 2021. The import of this rule is simply when there is default in appearance by the defendant at a civil trial, then the plaintiff may prove his or her claim as far as the burden of proof lies upon him or her and judgment maybe given accordingly. Dissatisfied with the turn of events the first respondent noted an appeal against that decision in case SC122/22.

In retaliation, Applicants have approached this court seeking leave to execute the said order, pending the noted appeal, citing that the appeal is both frivolous and vexatious, as well as, a delaying tactic, meant to frustrate and harass the applicant's cause. As such they argue that there are no prospects of success on appeal.

The respondent's grounds of appeal which need no duplication are premised on four points. Mainly, on the court's alleged gross mis-directions in the non-compliance with its standing rules. In the first place, the respondents argue that, only a three-day notice of set down for trial was given contrary to rule 54(8), High Court Rules, 2021 which stipulates that a five-day notice must be given. As a result, to the prejudice of the first respondent a *peregrinus* resident outside this jurisdiction with all his key witness were not accorded ample time to prepare for trial. This, from their perspective was good cause shown which should have swayed the trial court to consent to their application for postponement. The failure of the court take that into cognizance was a gross misdirection which in their view warranted the intervention of the Appellate court.

They also challenged the propriety of proceeding in terms of rule 56(1) of the High Court rules, 2021, when technically their presence on behalf of their client, in his absence was sufficient appearance in terms of rule 24 of the current High court rules. Given, it is their argument that the default judgment was erroneously granted and that this is an arguable ground before the Supreme court.

An outcry of the denial of the right to be heard was also raised by the first respondent, premised on the fact the order that was granted dismissed the first respondent's claim in under Case HC4941/20 without giving them audience. They state that though they had agreed that the outcome of the main matter being critiqued they did not envisage an outcome which did not address the merits of the case once and for all.

In response, the applicant noted that there were no prospects of success in the first respondent's first ground of appeal in three respects. Firstly, it was based on a postponement ruling, is not part of the ultimate order, therefore unappealable as an appeal lies on an actual order not its reasons. In support of this averment they relied on K*ingstones Limited v LD Ineson (Private) Limited 2006 (1) ZLR451(S) at p 459D-F*. *Chidyausiku v Nyakabambo* 1987 (2) ZLR119 (SC) at p124. *University of Zimbabwe v Jirira and 2Ors* SC 45/2013, amongst others. Secondly, that it was interlocutory, did not address the merits, therefore, it is not final and definitive. It follows that, since the first respondent did not seek the leave of the court in order to appeal against an interlocutory then they fall foul to section 43 (2)(d) of the High court Act Chapter 7.06, which dictates that leave of the court should be firstly obtained before an appeal is noted. They relied on *Technoimpex JSC v Rajendrakumar and* 4 Ors SC29/22, for that averment.

They advance further that, no appeal lies against a default judgment. The order of the cour*t aquo* of the 23rd of February 2022, granted in terms of rule 56(1), was a default judgment. Thus, the only recourse is the rescission of judgment route which they had previously pinpointed to the first respondent in writing but was not heeded. Relying on *Zvinavashe* v *Ndlovu* SC 2006 (2) 372 applicant submitted that, this is yet another fatal blow to the first respondent's prospects of success on appeal.

Applicants also refute that the first respondent was not accorded the right to be heard in the case in contention, as the court did not err in proceeding in terms of rule 56(1) as opposed to rule 24 of the 2021 High Court rules. In their view, rule 24 speaks to court applications where a litigant's interests are well represented by his or her legal practitioner if they elect not appear.

Further they argue that the first respondent, forfeited his right to be heard in case HC4941/20, by mutual consensus at the pre- trial stage in case, HC 2972/17 when they agreed that the outcome of that case will dispose the latter. They are bound by that consensus.

Lastly, they submit that, the balance of convenience favors them as they are being disturbed of their peaceful enjoyment of the contentious property by the first respondent because of several incessant lawsuits.

The summarized main thrust of the first Respondent's argument hinges on the court's alleged unjustifiable non-compliance with the rules of the court rules 54(8) and (24) of the High Court Rules, 2021, which they believe if they had not been breached then there will be no issues of interlocutory orders, default judgment and all the ancillary issues thereto, as raised by the applicants.

They postulate that, it is as a result of those breaches that an order adverse and prejudicial to them was issued and they stand to unjustly suffer irreparable harm if leave to execute pending appeal is granted. Therefore, so they advert, the balance of convenience should tilt in their favor, as, even though, there are numerous cases on the same subject matter between the same parties, pending before this court, it is the applicant who is enjoying and benefitting from occupational rights of the property, since 2013, at their expense.

In that regard, they opine that, if leave to execute pending appeal is granted, it renders their appeal academic and flies in the face of their right to test the correctness of the decision of a lower court before an upper court. They further argue that, the denial by the court of first instance, to recognize their attendance and the subsequent order encompassing case HC4941/20, in which they had agreed, will only be disposed of when the main case had been determined on the merits, infringed their Common Law right to be heard. As it where, they submit that, these cumulative factors make their case more arguable even in the face of the technical legal points raised by the applicant.

On analysis, in the *Netone Cellular v Netone Employees* & *Anor* 2005 (1) ZLR 275 SC at p 281, the factors to be considered cumulatively in an application for leave to execute pending appeal are, the prospects of success on appeal including more particularly the question as to whether the appeal is frivolous and vexatious, or has been noted with *the bona*

fide intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time and harass the other party. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute was to be refused. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute was to be granted. Lastly, the balance of convenience and hardship where there is potential harm and prejudice or on either respondent or appellant. The last three elements are sometimes referred to as the preponderances of equities see *Econet (Pvt) Ltd Telecel Zimbabwe (Pvt) Ltd 1988(1) Ltd 1998 (1).*

In that regard, two issues come to the fore. Whether or not the first respondent has prospects of success on appeal and whether or not the preponderance of equities favors applicant or the first respondent?

On the first issue, of prospects of success viz a viz the first ground of appeal. The first ground of appeal is based on the fact that the respondent's situation and explanation for postponement as presented before the trial court amounted to a good cause shown. Therefore, the failure by the court to consider it as such amounted to gross misdirection.

In evaluating, the first ground of appeal, this court is of the view that the issue that needs further interrogation is, was there no good cause shown to the court of first instance by the first respondents justifying the postponement sought?

Rule 54(8) specifies that, every notice of set down for trial shall be made returnable to the court and the sheriff shall submit the return of service to the registrar within five days after service has been affected and least five days before the date of the hearing.

This rule by employing the word "shall" makes it mandatory that service of the notice for trial should be at least five days. The mischief being that the parties must be given adequate time to prepare for trial. As such denial to observe that stipulated timeframe is prejudicial to the part who summoned to court on a very short notice. More so when, as in this case the affected party was based outside the country where the necessary travel arrangements had to be made timeously. Further, even if the local representative was present, in the absence of his foreign based star witnesses the matter was not going to proceed. A postponement was inevitable.

BHUNU JA Delta Beverages, (Private)Limited v ZIMRA SC9/2019, had this to say in respect to the non-compliance with the rules,

"It is clear that applicant failed to comply with rule 30(c), it has not been condoned for its non-compliance with the rules of court, hence, this application is a legal nullity".

See, *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147(S) and .*Lunat v Patel*, SC47/2022.

It is acknowledged that rules are for the convenience of the court, but they are also for standardization and uniformity. Though the court is at liberty to waive them in the interests of justice, in terms of rule 7 of Statutory Instrument 202 of 2021, it is enjoined to expressly state so. In the absence of an explicit justification then rules of the court ought to be adhered to.

In the case of *Apex Holding (Private) Limited v Venetian Blinds Specialists Limited* SC 33/15, it was noted:

"An application for the postponement of a matter which has been set down for hearing is in the nature of an indulgence sought, the grant of which is in the discretion of the judge or court before which it is made. The applicant must therefore show good cause for the postponement or that there is likelihood of prejudice if the court refuses the indulgence being sought'

There is evidence on page 15, paragraph 3 of the record that the first respondent had actually written a letter a day before the set down of the matter to the registrar notifying him that the defendant's witnesses were not readily available therefore was not in position to attend court.

Though the court has a prerogative to deny an application for postponement where there is no good cause shown as illustrated in the *Apex Holding (Private) Limited,* case above, could it be safely concluded that *in casu* there was no good and sufficient cause? Particularly, in respect to where the first respondent and his witnesses were situated at the time. The answer, surely lies with the Appeal court as this court cannot review its own judgment.

The applicant's technical points though legally correct in form cannot cloud the fact that there was non-compliance with the rules in the first place, in the failure to give the respondent's adequate notice to prepare for trial in terms of standing rules resulting in their prejudice.

This in the court's view is an arguable ground on appeal. Prospects of success on appeal, simply means, the chances that, a higher court or a different forum may have a different view from that of the first or previous court. The phrase, was adequately explained in the cases of, *Smith v S, 2012 1 SACR* **at** 567**,** *Shaoling & Anor v Haixi & Anor* HH90 of 2017, and *Nzara v Tsanyau and Ors* HH3031/2014, amongst several others.

Bwititi v Stanley farms (Private) Limited and 21 Others SC12 0f 2021, is authority that, 'Prospects of success entail that there is a reasonably arguable case emerging from the grounds of appeal…once there is sound and rational basis that case is arguable on appeal then there are prospects of success warranting the indulgence to be granted."

With respect to the right to be heard in case HC4941/20, I am inclined to agree with the first respondent as the reason of their concession to be bound by the order in case HC2972/17 was the outstanding issues were to be determined on merits that was all the burning questions will be disposed of once for all. Which was not the case, the default judgement did not address the merits. Therefore, the first respondents were denied the right to argue and defend their case on the merits

Even if we proceed to venture into the applicant's counter attack on the first ground of appeal on the appealability of the postponement ruling on the basis that they were the reasons for the ultimate order, that it was an interlocutory order and that it was a default order.

In my assessment, though admittedly what is appealed against is the order not the reasons, it is my considered view that on appeal what is interrogated are grounds of appeal. These grounds are an attack on the court's finding of fact, law and evidence, that is the rationale for the conclusion reached. So, in my view to actually sever, the *ratio decidendi* from the order itself is impractical. Therefore, in this case, there would not have been an order had the postponement not been denied. In *Terera v Lock And 3 Others* SC93/2021, it was noted that, for an appeal to enjoy any prospects of success it must attack the findings of the court aquo on the issues before it for determination. In that regard, the applicant's first line of attack does not stand.

An interlocutory order takes two forms. It may address an interim issue of a given case leaving the rest to be further addressed. It is thus an interim order, in which the leave of the court must be sought in terms of s43(2)(d) of the High Court Chapter 7.06. if it disposes of the whole matter, for instance, the special plea on prescription. Then it assumes the characteristics

of a final order and is appealable without leave. The authorities of *Blue Rangers Estates (Pvt) Ltd v Muduviri & Another* 2009, (1) ZLR (S). *Shaoling & Anor v Haixi & Anor, above, Mwatsaka v ICL Zimbabwe*, 1988(1) ZLR 1, *Mine Mills Private Limited & Others v NJZ Resources (HK) Limited SC40/2014* and Herbstein & van Winsen, *Civil Practice of the Supreme Court of South Africa*, 4 Ed p 877 *Minister of Tertiary Education v BMA Fasteners (Pvt)Ltd & Another*, SC33-2017 at pp 5-6.in the case of, *Netone cellullar (Private*) *Limited* & *Anor v Econet Wireless (Private) Limited 7 Another,* SC*36*/2017 have explored in detail the nature of interlocutory orders.

However, the case of *Minister of Tertiary Education BMA Fasteners (Pvt)Ltd & Another*, SC33/2017, emphasized that the court, faced with an interlocutory order has to decide whether it has a final effect or not. That being so, in the current scenario, since we have already concluded that the ruling on postponement led to the conclusion made then it had a final effect and was therefore not interlocutory in the circumstances of that case.

The last point raised as militating against the first respondent's ground of appeal, is that the appeal is against a default judgment, as such the best course of action as they had pointed out to the respondents was the rescission of judgment route. Notably, by raising this point it is evident that the applicants are acknowledging that the postponement was not interlocutory and is part of the ultimate order given, therefore were just testing waters.

In that respect, it is irrebuttable that the impugned decision is a default judgment, from whichever way you look at it. Nevertheless, the gist of the first respondent's argument is, had the trial court, taken the route of rule 24 of the 2021 high court rules which in their view recognizes that the appearance of a legal practitioner, even in the litigant's absence is attendance, there would never been an issue of default judgment in the first place?

An analysis of the rules in contention is thus called for. Rule 24 of the High Court rules 2021, is captioned, *Party in default at a trial*. Contrary to applicant's assertion, it is evident that the rule is restricted to trials not applications.

Rule 24 reads, If on the calling of any case, the plaintiff or the plaintiff in re-convention appears in court personally , or by his or her counsel and the other party is in default, the court may subject to rule 25, grant judgment or make such order as it considers the plaintiff or the plaintiff in reconvention, as the case may be , is entitled to upon the summons, declaration or claim in reconvention, as the case may be.(The emphasis is mine).

It is apparent that this rule speaks to default at a Civil trial commenced by the issuance of summons. In applying the literal rule of interpretation to the words in these provisions, which are clear, straight forward and unambiguous, particularly the underscored words, a litigant may appear in person or through his legal representative on the set down date of his or her trial. See, *Chegutu Municipality* v *Manyora* 1996(1) ZLR 262 (S) at 264D-E, *Thandikile v ZB Financial holdings (Private) Limited* SC48/18.

In *Stonewell Searches (Private) Limited* v *Stone Holdings (Private) Limited and 2 Others* SC22/21 at p 13 it was said,

> "in my view, the wording employed in article 25 of the Model law is clear and unambiguous, there is no need to resort to tools of interpretation to get the intention that motivated the enactment of the provision".

In contradistinction, r 56 (1), titled, *Civil trial proceedings*, provides as follows;

> If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his or her claim, so far as the burden of proof lies upon him or her and judgment may be given accordingly, in so far as the plaintiff has discharged such burden.

From the look of it, there seem to be an apparent conflict between rule 24 and rule 56. The literal interpretation of rule 24 seems to sanction that the appearance of a party's legal practitioner is tantamount to the appearance of that party in his absence. There seem to be no ambiguity.

Generally, courts, are encouraged not to readily conclude and acknowledge the existence of a conflict, but are enjoined to interpret both provisions in way that reconciles them. See, *Tamanikwa and Ors v Zimbabwe Manpower Development Fund* SC 33/2013. It is also a principle of statutory interpretation that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them, as elucidated in, *Amalgamated Packaging Industries Ltd v Hutt Anor, 1975 (4) SA 943 at 949.*

In *Tamanikwa and Ors*, above, it was further noted that,

> "… accordingly, where there are two sections in an Act which seem to clash, but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be preferred as opposed to an interpretation that will partly destroy the effect of one of them."

In my respective perspective, the legislature already provided in rule 24(1) that the appearance of the legal practitioner is the appearance of the litigant in his absence or not. Hence, it follows that rule 56(1) must be construed to speak to situations where there is absolutely no appearance at all by the other party or his legal representative. Where there is colloquially 'no show. This was the scenario in the *Zvinavashe* v *Ndlovu* SC 2006 (2) 372, no one showed up when the court roll was called which is quite distinguishable from this case where, there was an appearance by not one but two legal practitioners of the allegedly defaulting party.

Clearly, this aspect needs to be interrogated by the Appellate court. Yes, there are no two ways that it was a default judgment as pronounced in *Katritsis* v *De Macedo* 1966(1) SA 613(A, *Q'Gong v Mayor Logistics & Anor SC21/17, Ram valley Limited & Ors 1998 ZLR (1) at 110. Ram valley Limited & Ors 1998 ZLR (1) at 110 Katritsis* v *De Macedo* 1966(1) SA 613(A) *Zvinavashe* v *Ndlovu* SC 2006 (2) 372 and *Makon*i v *CBZ* SC47-20.

It is correct that in all these cases it was noted that a default judgment is not subject to an appeal but to rescission of judgment, ordinarily that should be the position but the respondent's case falls within the ambit of those special circumstance spelt out by BHUNU JA in *Guoxing Gong* v *Mayor Logistics (Pvt) Ltd and Anor* SC 2/17, wherein he noted,

> "it is trite that save in special circumstances which do not concern us here, no appeal lies to this court, against a default judgment which is normally reversed by the rescission of judgment or a declaration of nullity, it therefore follows that, in the absence of special circumstances, no valid ground of appeal can be laid the door of this court concerning the propriety or otherwise of a default judgment.'

As regards, the first issue under consideration, it is this court's finding that the applicant has not only an arguable case but prospects of success on appeal. Moreover, the prospects of success are not the only over ridding factor in applications of this nature. The other three requirements encapsulated as preponderance of equities have to be considered as a full package.

As stated earlier, the preponderance of equities embraces the last three requirements stipulated in the *Netone Cellular* case above canvassed as follows,

a. The potentiality of irreparable harm or prejudice being sustained by the applicant on appeal if leave to execute was to be refused.

It is on record that applicant is in physical occupation of the contested property. It not in dispute that what it seeking in its founding affidavit is peaceful and undisturbed occupation of the property in question. In paragraph, 18 of the applicant's founding affidavit, applicants admit that the property was registered into their names in 2017. In the same breadth, they also confer that there is an extant court order which ordered the reversal of the title which to date they had not complied with.

This position was confirmed by Ms Sanhanga, for the applicant, that the property is still registered in the applicant's name albeit the extant order of this court to reverse title. What is even more interesting is that the order they obtained and seek to execute is to compel change of title already in their names. Had these facts been placed before the trial court when they had been given an opportunity to lead evidence in terms of rule 56(1), the court would have noticed that the order was practically not feasible. So, there is no possibility of any potential harm on the part of the applicants.

b. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute was to be granted.

Evidently, the first respondent's defense and claim is that he lost his property through fraudulent means. The property is being occupied by the applicant. The applicant has not reversed title into his name in the face of an extant order. The benefit and enjoyment of the property is with the applicant. If the application to execute pending appeal is allowed it will render his appeal academic and defeats his challenge in case HC4941/20. See, *ZFCU* v *Gamara* case above

c. The balance of convenience and hardship where there is potential harm and prejudice or on either respondent or appellant.

It is my finding, derived from the inherent jurisdiction of this court, to rule in accordance with equities in a given case based in the synthesis of the facts evidence and the law, that the balance of convenience and hardship as illustrated herein, favors the first respondent. Their appeal can neither be classified as meritless, frivolous,

vexatious, a delaying tactic nor mala fide. It is a genuine quest to test the correctness of the decision of the lower court.

This is against the bedrock of the fact that in applications of leave to execute pending appeal the appellant has both an absolute and constitutional right to test the correctness of the decision of a lower court by an upper court. See, *ZCFU* v *Gamara* HH375 2015 and *Nzara v Tsanyau and Ors,* HH3031/2014, *Old Mutual Life Assurance Company (Pty) Ltd v Makgatho, HH39/07.*

In *Moloi and Another Premiere State Province and* Others (5556/2017[2021} ZAFSHC 37, (28 January 2021), it was stated that, the right to appeal against the decision of a court is a Constitutional right safeguarded by the rules of the court.

On the other hand, the court has an ultimate say, based on its inherent jurisdiction to exercise its discretion judiciously to arrive at a just conclusion. In the present case, the applicants are in possession of the property, they are benefitting from it since 2013. If they are allowed to execute pending appeal then the first respondent's appeal will be rendered useless and academic.

In *Old Mutual Life Assurance Company (Pty) Ltd v Makgatho,* above it was expressed that, "An application for leave to execute pending appeal cannot be determined solely on the basis of prospects of success on appeal especially where the whole object of an appeal is defeated if execution were to proceed. See *Wood N.O. v Edwards & Anor* 1966 RLR.. 336(a) 1966 (3) SA 443.

Similar sentiments where aired in, *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(30 SA at 544, wherein it was highlighted that,

> "the overriding consideration was the determination of what was just and equitable in all the circumstances aimed at preventing irreparable damage to either party… in the exercise of judicial discretion, which is derived from the

inherent discretion of the court to rule in accordance with the equities in a given case, the court would ask which party would be worse off if the order is granted or refused ".

Disposition

Interesting legal points have been raised by both parties enjoining the court to take a holistic approach and look at the bigger picture. This means the consideration of the effect of granting or denying the order as sought. There is no prejudice on the applicant if the application is denied pending the outcome of the appeal. They have waited from 2013 which is approximately ten years. Surely, they can wait a little bit longer to allow the crucial issues to be ironed once and for all thereby bringing finality to litigation.

Accordingly, in the application for leave to execute pending appeal is dismissed with costs.

Rubaya-Chinuwo Law Chambers, applicant's legal practitioners.
Sinyoro & Partners, the first respondent' legal practitioners.