RITA MARQUE MBATHA
versus
CONFEDERATION OF ZIMBABWE INDUSTRIES
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 4 February 2020 & 4 March 2020

Urgent chamber application

Applicant in person
H Mutasa, for the respondents

DUBE-BANDA J: This is an urgent chamber application for leave to appeal against a provisional order I granted on 21 January, 2020. The application was filed on 27 January 2020 and I caused the matter to be set-down for 4 February 2020. Applicant seeks an order drafted in the following terms:

Terms of the final order sought

That you should show cause why a final order should not be granted in the following terms:

a. Leave be and is hereby granted to the applicant to appeal against the decision of this Honourable Court in HC 377/2020.
b. The applicant shall within 3 days from the date of this order, file her Notice of Appeal attached as Annexure AA1 – AA4.
c. Upon the filing by applicant her Notice of Appeal with the High Court, the High Court Registrar shall cause the preparation of the record in case number 377/2020 to be prepared within 3 days.
d. Cause of this application shall be in cause.

Interim relief granted

WHEREUPON after reading the documents filed of record and hearing Counsel for the parties it is ordered that:

1. The application for leave to appeal to the Supreme Court shall be heard on an urgent basis in connection with which:
    a. Applicant shall within two (days) of the receipt of the first and second respondents' opposing affidavits file the replying affidavit.
    b. Upon the filing by applicant of her replying affidavit the High Court Registrar shall cause the application for leave to appeal to the Supreme Court under such case number to be set-down on the earliest available court date.

Service of provisional order

Leave be and is hereby given to applicant to serve this order on the respondents.

This application is opposed by the first respondent. Second respondent did not participate in these proceedings.

Background facts

For ease of reference and where the context permits, the parties will be referred to as follows; *Rita Marque Mbatha* or applicant and Confederation of Zimbabwe Industries (CZI) or respondent. On 16 January 2020, C.Z.I filed an urgent application in this court under case number HC 377/2020. At the conclusion of the hearing of case number HC 377/2020, I granted the interim relief sought by C.Z.I. The interim relief I granted is worded as follows:

1. That the second respondent (The Sheriff of Zimbabwe) be and is hereby directed to suspend the execution of the writ that was issued in favour of the first respondent pursuant to case number SC 119/19.
2. In the event that any property shall have been removed at the time of this order, the second respondent be and is hereby directed to release that property to the applicant.

At the conclusion of the hearing in chambers, I gave truncated reasons for the granting of the interim relief. *Rita Marque Mbatha* did not make a request for detailed reasons for the granting of the interim relief. All I saw was this urgent application for leave to appeal.

My reasons for granting the interim relief are the following; on 13 July 2018 the Labour Court ordered C.Z.I. to pay *Rita Marque Mbatha* a total of USD3 217 -74. Aggrieved by the Labour Court judgment, she appealed it to the Supreme Court, and the appeal was allowed with no order as to costs. The Supreme Court ordered C.Z.I. to pay her the sum of

USD41 161.30 and interest at the prescribed rate from the date of the court order to the date of full payment.

On 13 January 2020, she caused a writ of execution to be issued, and in pursuance thereof, the Sheriff of Zimbabwe (Sheriff), placed under judicial attachment the property belonging to the C.Z.I. Following the attachment of its property, C.Z.I. deposited an amount of RTGS$43 495.37 to her bank account, allegedly in full and final settlement of its obligations to her. She in turn, directed the Sheriff, notwithstanding the payment of RTGS $43 495.37, to proceed and recover the sum of USD 41 161.30 from C.Z.I. She contended that the judgment she is executing is sounding in United States dollars, and as a result she cannot be paid in RTGS dollars. As a result of these instructions, the Sheriff earmarked the property of C.Z.I for sale in execution.

It is at this point that C.Z.I. filed the urgent chamber application in case HC 377/2020. I heard the urgent application. C.Z.I. contended that although the Supreme Court order sounds in United States dollars, the debt itself relates to a historic date incurred prior to February 2019. The argument is that the debt is deemed converted to local currency at the rate of 1:1, i.e. between the United States dollar and the local RTGS dollar in terms of Finance Act No. 2 of 2019. *Rita Marque Mbatha* argued that on the particular facts of her case, the debt remains and has to be discharged in United States dollars.

I found that C.Z.I. had established a *prima facie* case for the granting of the interim relief it sought on the papers. Section 4 (1) (d) of S.I. 33/19 which was elevated and re-enacted into s 22 (1) (d) of the Finance Act, 2019 states that for such *sui generis* liabilities, including judgments debts, a rate of one to one between the United States dollar and the RTGS dollar will apply. See *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited and the Sheriff for Zimbabwe* SC 3/20. The liability of C.Z.I. to applicant pre-dated the effective date, i.e. February 2019, it is therefore affected by section 4 (1) (d) of S.I. 33/19 and s 22 (1) (d) of the Finance Act, 2019.

It's for the above reasons that I found that C.Z.I., had established a *prima facie* case for the interim relief it sought. I then granted the interim relief as prayed for. This is the interim relief that applicant seeks to appeal to the Supreme Court.

Leave to appeal

I make the point that the order I granted is interlocutory. In a 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: those which have a final and definitive effect on the main action; and those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not have a final and definitive effect on the main action. See *City of Tshwane Metropolitan Municipality* v *Afriforum and Another* [2016] ZACC 19

What I granted is a simple interlocutory order, I say so because it is subject to confirmation or discharge by this court on the return date. Again the order merely suspends, not cancel the writ of execution. The final fate of the writ will be determined on the return date.

In this jurisdiction, the general rule is that a provisional order granted under r 246 (2) of the High Court Rules, 1971 is always subject to confirmation or discharge before it becomes final and appealable. See *Patrick Makava* v *Rosemary Mutingwende, Minister of Lands and Rural Resettlement* SC 66/18. However, it is significant to ascertain that such an order is indeed interim, not a final order disguised as an interim order. A final order disguised as an interim order does not require confirmation on the return date.

The exception is that such a provisional order is appealable with the leave of a judge of this court. Section 43 (2) (d) of the High Court Act [Chapter 7:06] says no appeal shall lie 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—where the liberty of the subject or the custody of minors is concerned; where an interdict is granted or refused; in the case of an order on a special case stated under any law relating to arbitration.

In my humble view, s 43 (2) (d) of the High Court Act must be taken to refer to simple interlocutory orders. Interlocutory orders having a final and definitive effect, fall outside the purview of this prohibition or limitation. See *Nyasha Chikafu* v *Dodhill (Pvt) Ltd & 2 Ors* SC 28/09. As alluded to *supra,* the order I granted in a simple interlocutory order, therefore is appealable with leave.

Leave to appeal will be granted only when: there is a reasonable prospect of success; the amount in dispute is not trifling; the matter is of substantial importance to one or both of the parties concerned and a practical effect or result can be achieved by the appeal. See *Herbstein & van Winsen The Civil Practice of the High Courts & the Supreme Court of Appeal of South Africa* Vol. 2 1212. My view is that leave to appeal should not easily be granted where the order sought to be appealed is interim and where the final relief sought is still pending confirmation or discharge on the return date.

The grounds on which the leave to appeal is sought are these: it is contended that I erred in holding that C.Z.I. had established a *prima facie* case; it is said this court had no jurisdiction to deal with the matter which has been finalised by the Supreme Court on the merits, I take this allegation to mean that this court had no jurisdiction to adjudicate the execution of a writ emanating from a Supreme Court appeal; it is further contended that section 69 (3) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution) now guarantees the right of access to the courts, implying that a refusal of leave to appeal violates such right.

There is no doubt that the amount involved is substantial and the resolution of the matter is of substantial importance to both parties. As a result, this matter turns only on whether the appeal has any prospects of success.

To succeed in obtaining an interim relief in case number HC 377/2020, all respondent had to do was to establish a *prima facie* right. The right is only required to be *prima facie*, though open to some doubt. It need not be clear.

Respondent has made a payment of an amount of RTGS$43 495.37, which is equivalent to the amount owing in United States dollars. On the authority of the *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited and the Sheriff for Zimbabwe (supra)* respondent has discharged its indebtedness to applicant. I do not think that the Supreme Court may, taking into account the facts of this case, come to a different conclusion from the one I reached.

On the attack of the jurisdiction of this court to entertain case number HC 377/2020, the simple answer is that the writ in issue was issued from this court. It is a process of this court. This court is enjoined and has jurisdiction to regulate its own process. This ground of appeal is doomed to fail.

It is correct that section 69 (3) of the Constitution guarantees every person the right of access to the courts. It must be noted that the right of access to the courts is not absolute, it is limited by the limitation clause, i.e. section 86 of the Constitution.

Again, the doors of the appeal court are not closed to a person aggrieved by an interlocutory order to appeal. However, it cannot be in the interests of justice and fairness to allow unmeritorious and vexatious issues of interlocutory orders and judgments to be appealed as of right, the rolls would be clogged by hopeless cases, thus prejudicing the speedy resolution of those cases where there is sufficient substance to justify an appeal. See *S* v *Reins* 1996 2 BCLR 155.

Further in terms of s 43 (2) (d) of the High Court Act, every person whose application for leave to appeal has been refused by a judge of this court, has a right to petition a judge of the Supreme Court for leave to appeal. The availability of the right to petition a judge of the Supreme Court protects the right of access to the courts. *S* v *Reins (supra).* Therefore, the ground of appeal that says the refusal of leave to appeal violates section 68 (3) of the Constitution has no prospects of success on appeal.

There is also a point made that at the time I ordered a stay execution, execution had been carried out and as such the order had been overtaken by events. This was my preliminary view when I perused the papers in case number HC 377/2020. To the contrary, Mr *Mutasa*, for C.Z.I. submitted that the process of execution commences from the time the property is placed under judicial attachment to the time it is sold in execution. I agree. At the time I made the order proposed to be appealed, the attached property was still with the Sheriff, it had not yet been sold. Therefore, the process of execution was still afoot and this court was at large to stay execution at that stage. I do not agree that this proposed ground of appeal carries any prospects of success.

Applicants contends that I did not deal with points *in limine* she raised in case number HC 377/2020. What applicant calls points *in limine* are meaningless statements, which were irrelevant to the issues for consideration. In a general sense, points *in limine* are legal arguments which go to the root of the matter and capable of stopping litigation without delving into the merits, e.g. lack of jurisdiction; absence of urgency; prescription and absence of *locus standi*. Applicant raised a plethora of factual issues, which do not qualify as points *in limine*. Again I find that this proposed ground of appeal has no has no prospects of success.

Finally, I need to comment on the draft interim relief drawn by applicant. Mr *Mutasa,* criticised it, and the criticism is justified. The purpose of an interim relief is intended to interdict *prima facie* illegal activities. The one filed by applicant, is just incompetent. It does not speak to any illegal activities to be arrested pending the final resolution of the matter. During the hearing of this application, she tried to move for an amendment of the draft order, still causing more confusion. First, she submitted that paragraphs (a) and (b) of the interim sought be deleted, she then noted that once this succeeds, they will be no interim relief sought. She then said only paragraph (b) be deleted, and again changed position. I agree that the interim relief sought by applicant, is incompetent.

Costs

The question of costs has generally been seen as reflecting genuine discretion. Courts have always had a relatively free hand when it comes to determining costs orders. Notwithstanding the discretionary nature of costs orders, a coherent set of principles has emerged from case law. Respondent asks for costs on an attorney client scale. Costs on an attorney client scale are not for the asking. Something more underlies the practice of awarding costs at this scale, than the mere punishment of the losing party. Such costs may arise from the circumstances which give rise to the case or from the conduct of the losing party.

Mr *Mutasa* for the respondent has made a case for costs on the on a punitive case. He submitted that these costs should be awarded as a sign of the court's disapproval of the applicant's conduct of pursuing hopeless case. I agree. He contends that the application is frivolous and vexatious. The draft order is incomprehensible, one cannot tell from the draft order what applicant actually prays for. Her application is a pain to comprehend. To me this is a vexatious and unmeritorious litigation. It amounts to abuse of the process of this court. I accept that applicant is without legal representation, however there is a limit upon which such litigants may be spared costs on a higher scale. This is one application which should not have been filed at all. Respondent must be protected and not be put out of pocket by the vexatious and unmeritorious litigation instituted by the applicant. To discourage similar conduct in the future, there must be pain in the form of costs on the punitive scale.

Disposition

In conclusion, I find that there are no prospects of success on appeal and accordingly this application is dismissed with costs of suit on an attorney client scale.

Gill, Godlonton & Gerrans, respondents' legal practitioners