BLOOMING LILLY INVESTMENTS
versus
PETER VALENTINE
and
ALLEN SIBANDA
and
THE PROVINCIAL MINING DIRECTOR: MIDLANDS N.O.
and
THE MINISTER OF MINES AND MINERAL DEVELOPMENT N.O.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 & 29 April 2022

APPLICATION FOR LEAVE TO APPEAL DECISION OF COURT OF 20 APRIL, 2022

Advocate Hashiti, for the applicant
Advocate Magwaliba, for the respondents

MANGOTA J**:** On 7 April, 2022 the Registrar allocated HC2328/22 to me. HC 2328/22 had been filed through the urgent chamber book. I perused the founding papers and formed the view that the application did not meet the requirements of urgency. I endorsed my views on the face of the application and, in the process, disposed of the matter which had been placed before me.

On 14 April, 2022 counsel for the applicant wrote a letter to me through my clerk. He sought leave to present oral argument on the issue of urgency of the application. He placed reliance on *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 436 (H) and invited me to revisit my views on the matter which the applicant placed before me. He insisted that the endorsement which I made to the effect that the matter did not meet the requirements of urgency reflected my *prima facie* view without the benefit of oral argument from the parties. He remained of the view that I was not *functus officio* and I could therefore hear oral argument on the issue of urgency.

Shortly after I had received and disposed of HC 2328/22, HC2396/22 landed on my desk on 11 April, 2022. It involved the same parties, albeit in the reverse, and it related to almost the same subject-matter. I set it down for hearing at 10:00 a.m. of 20 April, 2022.

BACKGROUND FACTS

When the parties appeared before me at 10:00 a.m. of 20 April, 2022 to make submissions in respect of HC2396/22, Ms *Chinwawadzimba* who appeared for the respondent in HC 2396/22 drew my attention to HC 2328/22 which, it was agreed, was not officially set down. She urged me not to hear it. She placed reliance on *Nhambara* v *Nhambara & Ors* which, according to her, was on all fours with HC 2328/22 and which TSANGA J declined to hear on the basis that she had become *functus officio* following the circular which the Chief Justice issued which circular was to the effect that, once an endorsement had been made to say the matter is not urgent, the court can only convene a hearing to give its reasons. She also placed reliance on *Madza & Ors* v *The Reformed Church in Zimbabwe Daiseyfield Trust & 3 Ors*, SC 71/14 on the point at hand. She submitted that, once deemed not urgent, the court is not obliged to hear argument on urgency. She insisted that the court made its decision on 7 April, 2022 and it could not therefore revisit the same without violating the *functus officio* principle.

Mr *Hashiti* who appeared for the applicant under HC 2328/22 submitted to the contrary. He insisted that a judge who has heard argument on urgency from parties remains *functus officio*. He submitted that, where a judge has not heard the parties on the issue of urgency but endorses the matter as not urgent, the endorsement is the judge's *prima facie* view which he made without the benefit of oral argument. He argued that, until the matter is argued orally, the judge cannot be *functus officio*. He submitted that the view which I took of the matter on 7 April 2022 did not take into account the position of the third and fourth respondents who filed their papers on 12 April, 2022. The filed papers, he insisted, constituted changed circumstances which distinguished HC 2328/22 from MADZA's case.

On the abovementioned submissions of the parties, I remained of the view that the papers which the third and fourth respondents filed constituted changed circumstances which allowed me to depart from the case of MADZA which, I acknowledged, had a binding effect upon me. It remained my view that the views of the Provincial Director, Midlands NO and the Minister of

Mines and Mining Development, as contained in the papers which they filed on 12 April 2022, could neither be stifled nor wished away without doing an injustice on the one or the other or both of those officials of Government. I, accordingly, did not think that I was *functus officio*. I, with the consent of the parties, postponed HC 2328/22 to 10 am of 25 April, for hearing.

CAUSE OF ACTION

The decision which I made on 20 April, 2022 constitutes the first and second respondents' ("the respondents") cause of action. They applied for leave to appeal the same when the parties appeared before me for argument at 10 am of 25 April, 2022.

APPICATION

When the court and the parties were ready to deal with HC 2328/22, Mr *Maqualiba*, for the first and second respondents, applied for leave to appeal the ruling which I made on 20 April, 2022. He submitted that, when I endorsed that the matter-HC2328/22- was not urgent, the same was removed from the roll of urgent, and placed on the roll of ordinary, matters. He submitted that two issues constitute the basis of the appeal. These were:

1) whether, after endorsing that matter as not urgent, I could be seized with the determination of the same question and come to the conclusion of the same issue- and
2) whether or not the distinction which I made of HC 2328/22 and MADZA based on the papers which the third and fourth respondents filed allowed me to depart from MADZA as I did.

He insisted that the MADZA judgment remained binding on me notwithstanding factors which I found. He placed reliance of his application upon *Law Society of Zimbabwe* v *Contextiles*, 1989 (2) SA 574 (S) which he stated was authority for the proposition that, an applicant for leave to appeal, should establish only a *prima facie* case. That, he submitted, boils down to whether there is an arguable case. He insisted that the appeal is arguable especially when regard is had to MADZA. He urged me to grant leave to the respondents to appeal the interlocutory ruling which I made on 20 April, 2021.

Mr *Hashiti*, for the applicant, submitted that the application for leave to appeal was improperly filed. The application, he argued, violated r 94(1)(a) of the High Court Rules, 2021 as read with sub(para) (ii) of pp (c) and (d) of sub(s) (2) of s 43 of the High Court Act, [*Chapter 7:06*] in terms of which the provisions of subrules (1) to (7) of this rule shall apply to an application for

leave to appeal and to an application for condonation as if the words "Prosecutor-General" there were substituted the word "respondent". The application, he submitted, was fatally defective in that:

i) it was not orally made on the day that the ruling which is sought to be appealed was made;

ii) the respondents did not state the grounds of the application-and

iii) because it was not orally made on 20 April, 2022 the respondents should have made it in writing within twelve (12) days of the date of my decision; subject to the condition that the respondents had to state the reason as to why the application was not made orally when the decision which is sought to be appealed was made.

He submitted further that what the court gave was a directive that the matter in HC 2328/22 be set down before the court for argument. The directive, he argued, did not dispose of any of the issues between the parties. He insisted that the directive could not be appealed even with leave of the court. He placed reliance upon *Blue Rangers* v *Muduvuri*, 2009 (1) ZLR 368 (S). He urged me to consider the proposition which was enunciated in *Gillepsies Monumental Works P/L* v *Zim Granite Quaries (*Pvt) Ltd, 1997 (2) ZLR 436 which dissuades the court which is seized with a matter from entertaining piece-meal appeals against every ruling/directive/decision unless the decision relates to the final disposition of the matter. The decision, he submitted, dissuades the court from partitioning a case into portions. He insisted that the contemplated course is a piece-meal appeal.

APPICATION OF THE LAW TO THE FACTS

That the application which the respondents filed on 25 April 2022 is fatally defective requires little, if any, debate. It is defective in that it violates r 94(1)(a) as read with r 94(8) of the High Court Rules, 22021`. It was within the domain of the respondents to have filed their oral application on 20 April, 2022. They did not do so only to file their application for leave to appeal on 25 April, 2022. They advanced no reason for not have applied orally as they should have done. They also did not give any reason as to why they saw it necessary to apply for leave only on 25 April, 2022.

It is a fact that the views of the third and fourth respondents were not known to me on the day, 7 April 2022, that I endorsed that HC 2328/22 did not meet the requirements of urgency. Their views were only at hand when the respondents, through counsel, invited the applicant and me to

exercise our minds on HC 2328/22 *vis-a-vis* the letter which the applicant wrote to me. It is, in fact, Ms *Chinwawadzimba*, for the respondents, who started the ball rolling in regard to the hearing of HC 2328/22. Her aim and object, it would appear, were to move me to refuse to hear HC 2328/2. She urged me to take that view.

APPARENT MALA FIDES OF THE FIRST AND SECOND RESPONDENTS

Taken on its own, the application for leave to appeal would appear to be a genuine intention on the part of the respondents to test the correctness or otherwise of the decision which I made on 20 April, 2022. The letter which the respondents wrote to the Judge President on 21 April, 2022 however conveys a contrary view. A reading of its contents conveys a different view altogether. It conveys to the mind of its reader that the application for leave to appeal was for reasons other than an intention on the part of the respondents to test the correctness of my decision. I quote the relevant paragraphs of the letter from which the sting remains observed as follows:

> "1……..,
> 2……,
> 3. When parties appeared in another related matter in HC 2396/22 yesterday, 20 April 2022, before the same judge involving the same parties concerning almost the same and/or related subject, Honourable Justice MANGOTA brought to the fore HC 2328/22 and requested parties to make submissions on whether or not the matter he already ruled not urgent should be heard on an urgent basis.
> 4. ……,
> 5. Nonetheless after hearing arguments from both sides and authorities having been made and presented to the judge, Justice Mangota ruled that he can reconsider the matter and hear it as an urgent matter basing his ruling on the fact that the other party, Minister of Mines and the Provincial Mining Director were not opposed to the granting of the order.
> 6 ……..,
> 7. The judge had become *functus officio* once he made and endorsed that the application is not urgent. He cannot and must not hear the parties again since the applicant has an option to prosecute its matter on a normal roll.
> 8. ……..,
> 9. We are convinced that the judge cannot hear the matter.
> 10. He is the same judge who not only heard the matter in HC 2396/22 between the same parties but also in HC 308/20 concerning the same parties.
> 11. Already the same judge has set (*sic*) more than three times in matters involving the same parties and, with all due respect, the situation as it is will not be justifiable to our clients. It will not bring justice in these matters.
> 12. We are cognizant of the requirements of Rule 46 (1) of the High Court Rules, 2021 which require that an application for directions be made by way of a chamber application to the judge concerned. However, the matter before the court is perculiar and if it were to go by the provisions of the rule above, then it will be merely academic since the Judge will proceed to hear the matter on Monday, 25 April 2022, since there will be nothing barring him from proceeding.
> 13. In addition, this matter falls squarely within the provisions of Rule 7 (a) (b) of the same rules regarding situations where a departure from the Rule is permissible.

> 14. For the sake of justice, a departure from the Rules will be proper in the circumstances.
> 15. We are convinced that your office may help in providing directions on how best to proceed in the matter which is set to be heard on Monday.
> 16. Our instructions are to request that Honourable Justice MANGOTA recuses himself and or that the, (*sic*) since it was endorsed that it is not urgent, be treated as such and enrolled on the normal roll."

The above shows, in clear terms, that the respondents' intention is not to have HC 2328/22 heard and/or that, if it should be heard, it be heard by a judge other than myself. No allegation of bias was levelled against me. All the respondents want is that I should have my hands off HC2328/22. I have already stated elsewhere in this judgment that it is the respondents, through their counsel, Ms *Chinwawadzimba*, who brought HC 2328/ 22 into the equation when the parties appeared before me on the morning of 20 April, 2022. The respondents were therefore being economic with the truth when they stated as they did in para 3 of their letter to the Judge President. They gave the impression that I invited the parties to argue the urgency or otherwise of HC 2328/22 when the reality is that it is them who initiated the process which related to the hearing of that case. They moved the Judge President to dissuade me from hearing HC 2328/22 for no apparent reason other than that they did not want me to hear the case. The reasons which they advanced which are to the effect that I heard HC 308/20 and HC 2396/22 cannot justify their motion for my recusal unless and until they advance concrete reasons for my recusal. Their motion for directions from the Judge President betrayed their lack of knowledge of how we, as judges, operate. If they knew that the Judge President does not have the capacity to interfere with my judicial work, they would most likely not have written as they did. The fact that they did not copy their letter to the applicant shows their *mala fides* in an uncontroverted manner. How they wanted the Judge President interfere with my work beats the imagination of any right –thinking person. The clandestine manner in which they handled this part of their case embarrassed not only themselves but also Mr *Maqualiba* whom they engaged to appear before me on the morning of 25 April, 2022 to apply for leave to appeal. Because he was not informed of their letter of 21 April, 2022 he proceeded with the application for leave to appeal in clear violation of the relevant rules of court. He could not justify what he sought to achieve when it was pointed to him that the application which he filed was in violation of the rules of court.

I drew the attention of Mr *Maqualiba* to the letter which his instructing attorneys wrote to the Judge President. He understandably professed ignorance of the letter which, at any rate, was

not copied to the applicant. He moved for a brief adjournment to enable him to consult on the way forward. The adjournment was dully granted. On his return, he moved that the contents of the letter be ignored. He advised that the decision was not to pursue the application for recusal which constituted the foundation of the respondents' letter of 21 April, 2022.

Mr *Hashiti's* concern was that the letter was not copied to his instructing attorneys or him. He remained of the view that, since the issue of recusal was no longer a live one, the letter should not therefore detain the mind of the parties let alone that of the court.

I agreed with the position of the applicant. I made a ruling to an equal effect.

It was in the spirit of the abandoned matter for my recusal that Mr *Maqualiba* advised that he had instructions to seek leave to appeal. It is within the right of the respondents to appeal. The appeal should, in the view which I hold, be a genuine intention on their part to test the correctness or otherwise of my decision. It should not be used as a decoy by them to circumvent what appears to them to be an unpalatable situation as can be gleaned from pp 5 and 7 as read with pp 10- 16 of their letter. Least of all, it should not be used by them as a way of forum shopping for judges who, in their view, would bend over backwards to accommodate their views as no judge would succumb to that contemplated unwholesome conduct.

That the circumstances of HC 2328/22 cannot be the same as those of *Madza* v *The Reformed Church in Zimbabwe*, requires little, if any, debate. MADZA, it is a fact, did not have some of the respondents react to the case as did the third and fourth respondents in HC 2328/22. That the facts of MADZA are therefore distinguishable from those of HC 2328/22 cannot be seriously disputed. The third and fourth respondents who chose not to oppose the relief of the applicant confirm the allegation that the respondents despoiled the applicant. The views of the third and fourth respondents could neither be ignored nor wished away. The distinction which I made in MADZA and HC 2328/22 was therefore a genuine intention on my part to depart from the precedent which the Supreme Court was pleased to lay down in *Madza* v *The Reformed Church In Zimbabwe*.

That the respondents' intention to ensure that HC 2328/ 22 should not be heard is evident from the letter which their legal practitioners wrote to me on 25 April, 2022. I state that, when I had concluded hearing the parties on the application for leave to appeal, Mr *Hashiti*, for the applicant, reported off the record, that, from information which he had just received, another death

had occurred at one of the mining locations which are the subject of HC 2328/22. I realized that I required time to consider the submissions which the parties placed before me in respect of the application for leave to appeal. I, accordingly, requested the parties to discuss between themselves to find a way to arrest the situation at the mining locations pending my determination of the application for leave to appeal. The parties left my chambers for the discussion and returned with no ready solution in sight. It is on the basis of the observed matter and the need on my part to ensure that sanity prevails at the mining locations which are mentioned in para 2 of the draft order that I directed the applicant and the respondents off the five mining locations pending the hearing and determination of HC 2328/ 22.

I realized the error which I made when I directed the applicant and the respondents off the mining locations pending the hearing and determination of HC 2328/ 22. I took advantage of r 29 (1) (b) of the High Court Rules, 2021 which allows me to correct , rescind or vary an order or judgment in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission. I, accordingly, ordered that, pending the determination of the application for leave to appeal, neither the applicant nor the respondents shall be at any of the five (5) mining locations which are mentioned in para 2 of the draft order. I placed the five (5) mining locations in the hands of the police for the Province of Midlands for the duration of the judgment which related to the respondents' application for leave to appeal.

Mr *Hashiti* made an effort to make submissions on the matter which related to the alleged death of a person at the mine. I refused to hear him. My reasons were that the solution which I put into place in the form of the directive I made was the best temporary solution to the case of the parties pending my determination of the respondents' application for leave to appeal. Mr *Maqualiba* made a similar effort to respondent and I, in the same token, refused to hear him on the matter which related to the alleged death of the person for the reasons which I gave when Mr *Hashiti* attempted to make submissions.

The respondents' letter of 25 April, 2022 found further fertile ground of appeal of the temporary order which I made. They requested for reasons which prompted me to order as I did. They alleged that the order which I made had not been requested by either of the parties. They stated that they wanted to appeal against my order and the judgment immediately thereafter. They did not copy their letter to Mr *Hashiti* or to the latter's instructing attorneys.

It is with a sense of disquiet that I observe the clandestine manner in which the respondents and their instructing attorneys conducted themselves in respect of the hearing or otherwise of HC 2328/ 22.The most unfortunate part of their case is that they did not realize that it was my duty to ensure that sanity prevails between the parties to enable me to write the judgment on their application for leave to appeal without being hurried into it by anyone let alone the parties themselves. It is with some further disquiet that I observed the attitude which the respondents' instructing attorneys adopted. This, it is my view, is not how it should be. These should, at all material times, learn to distinguish their work from the inclinations of those whom they represent. The attitude which they displayed of filing letters without copying the applicant should be discouraged without fail. They should know that they are first and foremost officers of this court. They should therefore always aim to maintain an impeccable character in so far as their work is concerned. They should conduct themselves as such at all material times. They should realize that, when they move for a judge's recusal as they sought to do *in casu*, they must advance convincing reasons for the same. They should refrain from being swayed in different directions by those whom they represent. They must think through whatever course of action which they decide to take at any stage of any matter which they have placed before the court through the registrar. They know as much as I do that a judge does not allocate a case to himself or herself. They know that the system does and that, once a case has been so allocated, the judge has no choice but to deal with it. They should not use considerations which are extraneous to the case to request for recusal of the judge for their own unspecified reasons.

The functions of a judge, the respondents are better advised, are to dispense justice to all manner of people without fear or favour. He or she took the oath of office to serve all litigants whose cases the registrar places before him or her. He or she, more often than not, recuses himself or herself where, in his view, a perception of failure of justice arises. He or she also does so where a litigant moves for his or her recusal with reasons. The litigant should not move for his or her recusal in a round-about manner as the respondents did in the letter which they addressed to the Judge President. Nor should they move for his or her recusal in the form of the letter which they addressed to me on 25 April, 2022. They should simply come into the open and apply for the judge's recusal without any further ado. They should justify their application with reasons. They cannot justify the same on the grounds that the judge dealt with their case(s) on two different

occasions in that manner without alleging anything which shows a miscarriage of justice on the part of the judge.

DISPOSITION

Apart from the fact that the application for leave to appeal which the respondents filed is fatally defective, the same, it has been observed, is tainted with *mala fides* of a very serious magnitude on the part of the respondents. The application which is made with *mala fide* intentions cannot succeed. It is, accordingly, dismissed with costs.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners.
Musoni Masasire, respondents' legal practitioners.