EQUITY PROPERTIES (PRIVATE) LIMITED
versus
AL SHAMS GLOBAL BVI LIMITED
and
REGISTRAR OF DEESA N.O

HIGH OF ZIMBABWE
MANGOTA J
HARARE, 20 June 2022 & 8 November 2022

Opposed Matter

Adv F Mahere, for the applicant
Adv L Uriri, for the respondent

MANGOTA J: I set HC 6264/21 down for hearing. The hearing was scheduled for 20 June, 2022. At the hearing, the applicant which was the respondent in the case raised a preliminary point. It did so through counsel. Its *in limine* matter was that the first respondent ("the respondent") which was the applicant in the court *a quo* did not file its Heads within the *dies* which TSANGA J issued to the parties on 4 February, 2022. It insisted that the respondent was barred and could not, therefore, be heard until it unbarred itself.

The respondent opposed the preliminary point which the applicant raised. It admitted that it did not file its Heads within the *dies*. It claimed that it had agreed with the applicant that both parties would file their respective Heads outside the order which the court issued to them. It unsuccessfully applied to uplift the bar.

Following the submissions of the parties, I remained of the view that both of them flouted the order of TSANGA J. I decided that they were both barred and were, therefore, improperly before me. I, accordingly, struck HC 6264/21 off the roll and ordered that each party meets its own costs.

The decision which I made constitutes the applicant's cause of action. It filed this application for leave to appeal the same. It attached to the application its draft notice and grounds of appeal. It remains of the view that I should not have made a finding which was/is to the effect that it was barred. It insists that it could not file its Heads without the respondent having filed its Heads first. It claims that, once the respondent was barred, it no longer had any obligation to file

Heads or any further pleading other than to apply that default judgment be entered against the respondent. It, accordingly, moves me to grant leave to it to appeal.

The respondent opposes the application for leave to appeal. It insists that the appeal has no merit and therefore has no reasonable prospects of success. It alleges that both the applicant and it were improperly before the court. Both parties, it asserts, were in contempt of court by virtue of not obeying the court order which directed them to file their respective Heads within certain time –frames. It argued, through counsel, that Part XVI of the High Court Rules, 2021 deals with such applications as the one which the applicant placed before me. It placed reliance on Rule 94 (8) as read with sub-rules (1) and (2) of the same rule of court which sub-rules it claims are peremptory. It asserts that the application for leave which, according to it, does not comply with the mandatory rules of court, is fatally defective and must therefore be dismissed with costs.

An application for leave to appeal places the judge before whom it is placed in an invidious position. The applicant, it would appear, will be inviting the judge to review his own decision. The judge who takes the position of reviewing his own work falls into an unfortunate situation where, at the hearing, he is tempted to make common cause with the respondent. He should make every effort not to be tempted to agree with the respondent at the detriment of the applicant. He should, at all times, endeavor to be as objective as he humanly can. His guiding rod in the determination of such an application as the present one is whether or not the applicant has reasonable prospects of success on appeal: *Pichanic N.O*. v *Paterson,* 1993 (2) ZLR 163 (H); *Afrikaanse Pers Beperk* v *Oliver,* 1949 (2) SA 890.

Whether or not the application is defective on the alleged ground which is to the effect that the applicant did not comply with Rule 94 of the rules of court will unfold itself upon an analysis of the said rule as well as on a proper interpretation of the same. Sub-rule (8) of Rule 94 of the rules of court is relevant. Its import is that, where leave to appeal is necessary in respect of a judgment given in a civil court, sub-rules 1 – 7 of the rule shall apply to an application for leave to appeal ….as if the words 'Prosecutor-General' there were substituted the word 'respondent'. Sub-rule (1) of Rule 94 stipulates that where leave to appeal is sought the applicant:

a) *may* apply orally immediately after judgment has been entered against it-and
b) should state his grounds for the application.

Sub-rule (2) of Rule 94 is to the effect that, where the applicant has not made an oral application in terms of sub-rule (1), he *may* file with the registrar a written application within twelve days of the date of the judgment. The written application must, according to the proviso which is in the sub-rule, state the reasons why the application was not made in terms of sub-rule (1) of Rule 94 of the rules of court.

It is on the strength of the abovementioned sub-rules of Rule 94 of the High Court Rules, 2021 that the respondent argued that the application was/is defective. It submitted that the applicant violated sub-rules (1) and (2) as well as the proviso to sub-rule (2) of Rule 94. It insists that both sub-rules are peremptory and should, therefore, have been complied with to the letter and spirit.

The respondent's contention, it has been observed, is that the application for leave is defective. I disagree. Whilst it is agreed that Rule 94 relates to applications for leave to appeal, the rule is not peremptory as the respondent would have me believe. It is optional or discretionary. Its use of the word *'may'* in each sub-rule says it all. It only becomes peremptory in paragraph (b) of sub-rule (1). It becomes mandatory in the sense that, once the applicant has taken the option to apply orally for leave to appeal, he is enjoined by the rule to state as well as record his grounds of the application as part of the record. The net effect of paragraph (a) of sub-rule (1) of Rule 94 is that he is at liberty to apply or not to apply orally for leave to appeal.

Equally of importance to the applicant is the discretion which sub-rule (2) of Rule 94 confers upon him. He *may*, or *may not*, file a written application with the registrar where he has not exercised his right to apply for leave to appeal under sub-rule (1) of Rule 94 of the rules of court. However, where he chooses to exercise his right in terms of Rule 94(2), the proviso to the rule imposes upon him certain conditions which he must comply with. He must, for instance, state the reason why he refrained from exercising his option in terms of sub-rule (1) of Rule 94. He must also state the proposed grounds upon which he contends that leave to appeal should be granted to him.

What is evident, from a reading of sub-rules (1) and (2) of Rule 94 of the rules of court is that the applicant has a choice to pursue his options under either of the sub-rules but not both. What is also clear is that, the moment he takes the one or the other sub-rule, his performance under his chosen sub-rule becomes *peremptory* leaving him with no choice but to act in accordance with the route which he has taken.

The rule remains silent where he does not pursue his rights in terms of either sub-rule (1) or sub-rule (2). It follows, in my view that he can choose not to follow the one or the other of the two sub-rules as the applicant did *in casu* and still be able to apply for leave to appeal under the common law. The question which begs the answer is: can the application which he filed outside Rule 94 of the rules of court be suggested to be defective. I think cannot. The application remains as valid as the one which an applicant files under Rule 94 of the High Court Rules, 2021. This application cannot, therefore, be said to be defective. It is within the law, so to speak.

For the applicant to succeed in its application for leave to appeal, it must demonstrate that it has reasonable prospects of success on appeal. In laying down the test of reasonable prospects of success, the authorities were only stating the obvious. The obvious is that it would be a waste of the time of the court and that of the respondent if the applicant were to appeal just for the fun of it. An appeal which is filed without the applicant's serious intention to test the correctness or otherwise of the decision of the court *a quo* is frivolous and vexatious. No court will sanction an application which relates to such an appeal.

The context of this application is relevant. The context is that, on 4 February 2022, Tsanga J before whom the parties appeared set specific time-lines within which they were to file their respective papers in preparation for the hearing of the matter. This was scheduled to take place at 10 am of 28 March, 2022. The learned judge directed, among other directions, that:

a) ……
b) ……
c) the applicant *a quo* shall file its Heads on 16 February, 2022- and
d) the respondent *a quo* (applicant *in casu*) shall file its Heads on 2 March, 2022.

That both parties filed their respective Heads outside the above-mentioned time-lines requires little, if any, debate.

In deciding as I did, I remained alive to the fact that the directions of TSANGA J are, no doubt, an order of court which the parties had no choice but to obey. I was further persuaded by case authority which discussed the issue which the parties had placed before me. It is, for instance, trite that when a court order provides a time limit within which to do something…such time limits ought to be followed. Failure to comply with such time limits leads to lapsing of the rights conferred therein: *The Sheriff of the High Court of Zimbabwe* v *Madziro* & Ors, HH 670/15. It is

a plain and unqualified obligation of every person against, or in respect of ,whom the order is made by the court of competent jurisdiction to obey it, unless and until that order is discharged; and, as is known, two consequences flow from that obligation. The first one is that anyone who disobeys an order of court is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to court by such person will be entertained unless he has purged himself of his contempt: *Artiknson* v *Artkinson* (1952) 2 All ER 567 {CA}.

By not complying with the order of TSANGA J, both the applicant and the respondent were, no doubt, in contempt of the court order. None of them could therefore be heard unless it purged itself of the contempt. I found the applicant's finger-pointing at the respondent to have been made without any serious intention on its part. This was a f*ortiori* the case given that it did not, on its part, make any effort to live within the four corners of the court order which the learned judge issued to the respondent and it.

The applicant premised the preliminary point which it raised on the order of TSANGA J. It did not rest it on the rules of court as it seems to suggest in its Heads. It submitted that the respondent did not comply with the order of TSANGA J. Its reliance on Rule 59 (21) of the rules of court is, therefore, misplaced.

Because it referred me to the order of the learned judge, the decision which I made was not premised on the rules of court. It rested on the order of the court. The specific time-lines which the learned judge dished out to the parties aimed, in my view, at preparing them for the hearing which had been scheduled for 28 March, 2022 at 10 am. Their belated filing of Heads had an adverse effect on the hearing of the application. It was only fortuitous that it was not heard on the date to which it had been set down. I found the conduct of the parties both of whom were / are ably legally represented to be wanting in the extreme sense of the word.

The applicant's reference to Rule 59(21) of the rules of court imports a new dimension into the equation of the decision which I made in June, 2022. The dimension centers on what parties to a case should comply with between an order which the court properly constituted issues to them and the law as stipulated in the rules of court. Which of the two laws, in other words, must give way to the other. The dimension raises jurisprudential issues which only the superior court can clarify for the benefit not only of the court but also of litigants. It is on the mentioned score that I remained

persuaded to grant leave to the applicant to prosecute its appeal. The prosecution of the same will, no doubt, enhance the development of the law and the court's appreciation of the same.

The application is, in the premise, granted as prayed.

Chambati Mataka Attorneys at Law, for the applicant
Atherstone & cook, for the respondent