REPORTABLE (98)

ERICA NDEWERE
v
JUDICIAL SERVICE COMMISSION

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MATHONSI JA & CHATUKUTA JA
HARARE, SEPTEMBER 27, 2022

B. Mtetwa with *R. Sitotombe,* for the appellant

A. Mugandiwa, for the respondent

GUVAVA JA:

[1] This is an appeal against the whole judgment of the High Court (the 'court *a quo'*) wherein the court granted a provisional order in an urgent chamber application made by the respondent. The court *a quo* ordered that a motor vehicle in the possession of the appellant be placed under judicial attachment pending the return day of the provisional order. The court further interdicted both the appellant and the respondent from using the motor vehicle pending the determination of the matter.

[2] At the hearing of the appeal the court requested the parties to address it on whether or not the appellant ought to have sought leave to appeal before noting the appeal. After hearing submissions by counsel, the court determined that there was need to seek leave to appeal and

struck the matter off the roll. The appellant has requested reasons for this decision. These are they.

FACTS

[3] The appellant is a former judge of the High Court. She was removed from office by the President on 17 June 2021 in terms of s 187 (8) of the Constitution of Zimbabwe, 2013 for gross misconduct. The respondent is a Commission established in terms of s 189 of the Constitution.

[4] During her tenure as a judge, the appellant was issued with a motor vehicle, namely Mercedes Benz E300 registration number ADY4743 ('the motor vehicle') as a condition of service. The motor vehicle was for personal and official use. The vehicle was registered in the name of the Master of High Court, a former department of the respondent.

[5] After her removal from office, the respondent demanded that the appellant return the motor vehicle by letter dated 19 April 2022. The appellant declined to return the motor vehicle. In her response dated 28 April 2022 the appellant stated that she would not return the motor vehicle as she was entitled to purchase it in terms of the Judges' Conditions of Service.

[6] The respondent approached the court *a quo* with an application for *rei vindicatio* for the recovery of the motor vehicle under case number HC 3117/22. The respondent was of the view that the option to purchase the motor vehicle was not available to the appellant as she

was no longer a sitting judge. The respondent further averred that the motor vehicle belonged to it as it was registered in the name of Master of High Court.

PROCEEDINGS BEFORE THE COURT *A QUO*

[7] Whilst the application under HC 3117/22 was pending, the respondent approached the court *a quo* on an urgent basis seeking an order that the motor vehicle be placed under judicial attachment. The respondent argued that there was a real danger that the motor vehicle may be damaged or destroyed whilst in the appellant's possession as according to Government policy it was not insured. The respondent submitted that, there was thus a serious apprehension of irreparable harm to it if no intervention was made by the court for the preservation of the motor vehicle. The terms of the interim relief sought and granted were as follows:

> "INTERIM RELIEF GRANTED
> Pending the finalization of this matter, the applicant is granted the following relief:
> 1. That motor vehicle, Mercedes Benz E300 registration number ADY 4743, be and is hereby placed under judicial attachment.
> 2. The respondent be and is hereby ordered to surrender the above mentioned vehicle to the Sheriff of the High Court, Harare, Samora Machel Avenue, Harare, within 24 hours of service of this order where the motor vehicle shall be kept/stored by the sheriff pending the return day.
> 3. In the event of the respondent failing to comply with the terms of para 2. of this order, the sheriff be and is hereby directed and authorised to take any or all such steps as are necessary to recover the motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent.
> 4. Both the applicant and respondent are hereby interdicted and prohibited, with immediate effect, from driving, using or in any manner dealing with the motor vehicle and/or allowing any other person to do so except for the purposes of complying with this provisional order."

[8] The appellant opposed the application and averred that the respondent was not the owner of the motor vehicle as it was owned by the office of the President and Cabinet. The appellant

further averred that she was entitled to purchase the motor vehicle and the fact that she was no longer a sitting judge did not preclude her from exercising that right.

[9] At the hearing of the matter in the court *a quo*, the appellant's counsel raised a point *in limine* to the effect that the application was not urgent which point was dismissed by the court *a quo*. The court *a quo* found that the matter was urgent as there was a real risk of irreparable harm to the respondent.

[10] On the merits of the matter, the court found that there was no guarantee that the motor vehicle would be safe if it was left in the appellant's hands pending determination of the litigation. It stated that the respondent stood to suffer prejudice if the application was not granted. On the other hand the appellant would not be prejudiced since she had not been using the vehicle since December 2020 as she had alleged that the motor vehicle had been involved in an accident. The court thus found that the respondent was entitled to the relief sought. Aggrieved by the decision of the court *a quo*, the appellant noted the present appeal.

SUBMISSIONS BEFORE THIS COURT

[11] At the commencement of the hearing the Court inquired from counsel for the appellant whether or not the appeal was properly before it for want of leave to appeal. In response to the point raised, Mrs *Mtetwa*, Counsel for the respondent argued that leave to appeal was not necessary as the order of the court *a quo*, though being an interim order, was final in effect. It was counsel's contention that as the interim order directed the appellant to surrender the

motor vehicle, it meant that such order disposed of the issue of the appellant's right to possess the motor vehicle.

[12] Counsel further argued that there was no preservation of the motor vehicle but, rather, the interim order took away the motor vehicle from the appellant and that this amounted to her rights to the motor vehicle being determined as the respondent would not return the motor vehicle to her. Counsel further submitted that the Supreme Court had pronounced itself in *Chiwenga v Mubaiwa* SC 68/20 that an appellant appealing against an interim order did not require leave to appeal if the order was final in effect. In this regard, counsel maintained that the interim relief was final in nature as it took away the appellant's rights to the motor vehicle.

[13] *Per contra*, Mr *Mugandiwa*, counsel for the respondent submitted that there was no final determination of the rights of the parties with regards to the motor vehicle as the relief was granted pending the finalization of the vindication application. Counsel thus submitted that the order of the court *a quo* was not final in effect and therefore the appellant required leave to appeal in terms of s 43 (2) (d) of the High Court Act.

ANALYSIS

[14] Section 43 of the High Court Act [*Chapter 7:06*] ('the High Court Act') provides for the right to appeal to the Supreme Court against an order of the High Court. Of importance, is s 43(2) (d) which provides for appeals against interlocutory orders. Section 43(2)(d) of the High Court Act provides that:

> "(2) No appeal shall lie—
> …
> (*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, …"

[15] It is trite that an order that is final and definitive, even if granted as an interim order, does not require leave to appeal. (See *Chiwenga v* Mubaiwa SC 68/20).

[16] *In casu* the interim order was granted pending the determination of the final order sought. In the final order sought the respondent was seeking an interdict pending the finalization of the vindication application made under HC 3117/22. This was an order to preserve the state of the vehicle until the rights of the parties to the dispute had been resolved. The order of the court *a quo* was a temporary interdict prohibiting use of the vehicle and keeping it under safe custody with the Sheriff pending the return date. As such the order fell squarely under the provisions of s 43(2) (d) of the High Court Act. The scholars Cilliers *et al*, Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed, Vol. 2, p. 1455 state the purpose of an interim interdict as being for:

> "… the preservation or the restoring of the *status quo* pending the final determination of the rights of the parties. It does not affect or involve the final determination of such rights."

It is of note that none of the protagonists in this matter therefore would have access to the motor vehicle until their respective rights were determined under HC3117/22.

[17] In *Blue Rangers Estates (Pvt) Ltd v Muduviri & Ors* 2009 (1) ZLR 368 (SC) at p 377 E-F MALABA DCJ (as he then was) emphasized the point that in determining whether or not

an order is interlocutory one must look at the terms of the order made. He explained it in the following way:

> "The fact that the order was in the form of an interim relief is irrelevant to the consideration of the question whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order. For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding." (underlining is my own)

[18] This is precisely what the order of the court *a quo* sought to do. Its effect is to preserve the motor vehicle. When the vindication application is finally determined and the rights of the parties to the motor vehicle are finally defined, the motor vehicle would be awarded to the successful party. The motor vehicle was not awarded to either party by the provisional order. It cannot be argued that the placing of the car under judicial attachment would become indefinite and permanently dispossess the appellant of the motor vehicle. Clearly, none of the parties will have authority or power over the motor vehicle whilst it is under judicial attachment.

[19] Appellant's counsel was at pains to make the point that leave to appeal is not necessary as this Court in *Chiwenga v Mubaiwa* SC 68/20 heard an appeal against an interim order, which appeal had been noted without leave. However, it is important to state at the outset that the facts in the *Chiwenga* case (*supra*) are clearly distinguishable from this case. In the *Chiwenga* case (*supra*), the respondent therein made an urgent application for what she termed "an application for a provisional spoliation order" before the High Court. What was granted by the court therein and became the subject for the appeal before this Court was a

final interdict which was granted by the court *a quo* which had not been sought by the applicant therein.

[20] It is in my view necessary to set out in full the order that was granted by the High Court in the Mubaiwa v Chiwenga case. It states as follows:

> "1. The respondent (Constantino) is hereby ordered to restore custody of the minor children namely, *Tendai Dominique Chiwenga* (Born 4 November 2011), *Christian Tawanazororo Chiwenga (*Born 5 November 2012) and *Michael Alexander Tadisiswa Chiwenga (*Born 13 February 2014) to the custody of the applicant (*Marry*) within 24 hours of this order.
> 2. The respondent (Constantino) is hereby interdicted and restrained from interfering with applicant's (*Marry*) access to, use and enjoyment of the property known as 614 Nick Price Drive, Borrowdale, Harare.
> 3. The respondent (*Constantino*) is hereby interdicted and restrained from interfering with applicant's (*Marry*) access to, use and enjoyment of the property known as Orchid Gardens Domboshawa, Harare.
> 4. The respondent (*Constantino*) is hereby interdicted and restrained from interfering with applicant's (*Marry*) access to, use and enjoyment of the motor vehicles, namely Toyota Lexus, Mercedes Benz S400, Mercedes Benz E350 (Black).
> 5. Respondent (*Constantino*) is interdicted and restrained from interfering with applicant's (*Marry*) access and or possession of her clothing.
> 6. The respondent (*Constantino*) is ordered to pay applicant's (*Marry*) costs of suit."

[21] As was aptly stated by this court in the Chiwenga case (*supra*) at page 7 of the judgment, the court had proceeded to grant final relief in instances when it had been asked to grant a provisional order. To compound the issue, the order sought and granted was for spoliation. It is an established principle of our law that an order for a *mandamus van spolie* is final and cannot be granted on an interim basis (see *Blue Rangers Estates (Pvt) Ltd v Muduviri* 2009 (1) ZLR 376 (SC); *Gateway Primary School & Ors v Marinda Fenesy & Anor* SC 63/21; *Bhadella v Bhadella and Another* HH 604/21).

[22] Such an order is clearly covered by s 43(2) (d) (ii) of the High Court Act. Thus the appeal made in the *Chiwenga case (supra)* could be noted without leave being sought as it was against a final order. By operation of law the appellant therein could appeal against that judgment as an appeal against a final interdict does not require leave to appeal.

[23] In instances where an interim interdict has been granted *a quo*, as in this case, this Court has already pronounced itself and stated in no uncertain terms that an interim interdict is interlocutory and requires leave to appeal in terms of s 43(2) (d) of the High Court Act. In the case of *Jesse v Chioza* 1996 (1) ZLR 341 (S) GUBBAY CJ stated as follows at p 346-347:

> "The refusal or grant of a final interdict is, of course, appealable as of right. See s 43(2)(ii) of the Act; and *Setlogelo v Setlogelo* 1914 AD 221 at 226. So too is the refusal of an interim interdict. See *Ex p Lewis & Marks* 1904 TS 281 at 282; *Carlis v Hertz's Trustee* 1904 TS 584 at 585. This is because if the interim relief is refused, it irreparably anticipates or precludes some of the relief which would or might have been granted at the ultimate hearing. If it were not appealable there might be no way of preserving the *status quo* in regard to the subject matter of the action. See *Mears v Nederlandsch ZA Hypotheek Bank* 1908 TS 1147 at 1150; Davis v Press & Co 1944 CPD 108 at 113; Harms Civil Procedure in the Supreme Court at para S20, N2. <u>On the other hand the grant of an interim interdict is interlocutory, for the order is designed to maintain for the time being the status quo. This proposition is supported by ample respectable authority…Leave to appeal is therefore required in terms of s 43(2) of the Act</u>. In this case no such leave was requested or granted." (underlining is my own)

As may be noted in this case, GUBBAY CJ clearly distinguishes between final interdicts and interim interdicts. He comes to the conclusion that it is only final interdicts which do not require leave.

[24] The respondent *in casu* obtained an interim interdict and as such the appellant was therefore obliged to obtain leave to appeal before the court *a quo* prior to noting the present appeal. The appellant did not do this and as such was improperly before this Court.

DISPOSITION

[25] The case of *Chiwenga v Mubaiwa* (*supra*) can be distinguished from the present matter. In that case the court was dealing with spoliation proceedings wherein a final order is always granted. The interdicts granted in that case were also final as they sought to stop any form of interference after the respondent therein had been awarded the children and the property. This is a completely different scenario from this case where interim relief was sought and granted.

[26] The appellant ought to have sought leave to appeal before noting this appeal as dictated by s 43(2)(d) of the High Court Act. It was for these reasons that this Court came to the inescapable conclusion that the appellant was improperly before it for want of leave to appeal and made the following order.

'The matter be and is hereby struck off the roll with each party bearing its own costs.'

MATHONSI JA: **I agree**

CHATUKUTA JA: **I agree**

Mtetwa & Nyambirai, appellant's legal practitioners

Wintertons, respondent's legal practitioners