ALAGONIA FARMING (PRIVATE) LIMITED
and
ALESTER ZIYANGA
And
MIRIAM ZIYANGA
versus
NORTHERN TOBACCO (PRIVATE) LIMITED
and
BRIGHT ZIYANGA
and
TIAN ZE TOBACCO (PRIVATE) LIMITED
and
TOBACCO INDUSTRY AND MARKETING BOARD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 19 February 2014

Opposed application

I Ndudzo, for the applicant
T Magwaliba, for the 1st respondent
A Chambati, for the 2nd respondent
F F Nyamayaro, for the 3rd respondent

HUNGWE J: After hearing submissions by counsel I dismissed the application and indicated that should my reasons for so dismissing it be required they would be furnished upon written request as I had briefly outlined them in court. These are they.

Applicant, a company carrying on a farming business somewhere in the Hwedza area, approached this court seeking an order through the chamber book, in the following terms:

"It is ordered that:

1. The judgment granted by this honourable court on the 18th of December 2013 under case number HC 10802/13 be and is hereby set aside.

2. Execution of judgment made by this honourable court under case number HC 10261/13 be and is hereby allowed pending determination of the appeal filed under case number SC 537/13.
3. Any party opposing this application to bear the costs of suit."

The events leading to the above order are set out in the heads of argument drawn on behalf of the first respondent. These may be summarized as follows. A dispute arose between first respondent and the applicant company, its co-directors who own the farm upon which the company farms tobacco. The dispute regarded certain terms and conditions as well as the size of the crop which respondent had sponsored the company to grow. Second respondent at some point indicated that it was not involved in the dispute. First respondent then sought and obtained a preservatory order in terms of art 9 of the Arbitration (Model Law) before Tsanga J under case number HC 9919/13 citing Alagonia Farm, Alester Ziyanga and Miriam Ziyanga. Alagonia Farm issued summons under HC 9928/13 seeking cancellation of the tobacco grower contract with Northern Tobacco. Tsanga J granted the order. Bright Ziyanga, second respondent then filed an urgent application in HC 10261/13 seeking an order staying Tsanga J's order. He also seeks the rescission of the judgment on the basis that although the order affects him, he had not been cited in HC 9919/13. That application was placed before me. All the parties appeared at the hearing but only second respondent and first respondent actively urged the court to grant or dismiss the application. The rest adopted an indifferent attitude. That application was granted in HC 10261/13. First respondent was dissatisfied with the order granted in favour of second respondent. It sought leave to appeal against the order in HC 10261/13. Upon perusal of the application and before the other parties had indicated their attitude to the application, I granted the order on its merits. It is that order which is now subject of the present application.

It must be noted that my judgment in HC 10261/13 is now case number HH 484/13. The application for leave was made under case number HC 10802/13. Upon the grant of leave, first respondent noted an appeal against my judgment in HH 484/13. That appeal is now pending in the Supreme Court under case number SC 537/14. The basis of the application is multi-pronged. Principally the applicants' complaint is that the first respondent adopted the wrong procedure in

seeking the grant of leave to appeal. Second, the court procedure adopted by the court which in essence granted leave without affording the other parties to the dispute an opportunity to be heard infringed those parties' constitutional right to a fair hearing. Third the order for costs was made against the same parties when they had not been served or made aware of the set down of the application for leave in HC 10802/13.

Applicants made reference to r 449 of the High Court Rules, 1971, but I assume this was in respect of their submissions in HC 9919/13 as certainly that rule is of no application in the present matter before me. The order granted in HH 484/13 was not erroneously sought or erroneously granted. *Gondo & Another* v *Syfrets Merchant Bank Ltd* 1997 (1) ZLR 202 (H). That submission, if it was directed at the order for costs against them in HC10802/13, makes sense. The order for costs in HC 10802/13 was certainly granted in error. It did not require an application in the present form in order for me to correct it. Had it been drawn to my attention, I would have unilaterally corrected it by deleting all reference to costs in the order I made on 18 December 2013. However that is the only limited success which this application can possibly enjoy. In any event, *Mr Magwaliba*, for the first respondent, informed the court that there was no intention to pursue that order for costs. I say this because I find no merit in the rights based argument relating to the procedure I adopted in granting the application for leave without having granted the other side an opportunity to be heard, either orally or through written submissions. By their very nature applications for leave ought to be dealt with summarily. It is a procedure by which all superior courts world-wide regulate their case-flow.

In the Constitutional Court of South Africa matter of *Vincent Maredi Mphahlele* v *The First National Bank of South Africa Limited* CCT 23/98 GOLDSTONE J remarked:

> "To require the Supreme Court of Appeal to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that "leave" be obtained. Such matters can and should be disposed of summarily."

Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In

countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their dockets. In those jurisdictions, therefore, leave may be refused even where there are prospects of success on appeal.

As was stated by LAMER CJ in *R* v *Hinse* (1996) 130 DLR (4th) 54 @62:

> "The ability to grant or deny leave the represents the sole means by which this court is able to exert discretionary control over its docket. In order to ensure that this court enjoys complete flexibility in allocating its scarce judicial resources towards cases of true public importance, as a sound rule of practice, we generally to not convene oral hearings on applications for leave."

This rule of practice also prevails in our jurisdiction. Reliance on a breach of s 69 (1) the Constitution is therefore, in my view, misplaced. In any event most of the arguments put forward by the applicants are good grounds for arguing against the merits of the appeal in the Supreme Court when the appeal proper is heard. This brings me to the stronger reason, in my respectful view, for dismissing this application. As already pointed out, this court's decision in HH 484/13 is now subject of an appeal. Whether that appeal is not properly before the Supreme Court cannot be a matter within the province of this court to decide. That appeal is presumed to be properly before that court. There is a presumption operating in favour of validity of due process. It is rebuttable in the appropriate jurisdiction. That jurisdiction cannot be found in this court. In a way this court is functus officio once the Registrar of a superior court has accepted due process since that other court is deemed to be seized with that matter. In short, I am not persuaded that this court can purport to interfere with its decision once it is subject of an appeal besides the accepted exceptions in terms of the rules of court conferring jurisdiction to adjudicate on applications for leave to execute pending appeal. This is not the thrust of the application before me. I am being asked to set aside my own judgment when that judgment is subject of an appeal. If I were to be big-headed and heed that ominous call, then the whole appeal procedure would be turned on its head!

Even if I were wrong in concluding that this application must fail for this reason, there is another basis for dismissing this application, which reason touches upon applicant's lack of *locus*

standi in judicio. As pointed out above, the prime mover of the application in HH 484/13 was second respondent. That application was granted on the basis that he had had been afforded an opportunity to be heard before a decision affecting his right to property was made. If opposition to an application for leave to appeal against the grant of leave were to be anticipated, it could only have made by or on behalf of second respondent. The present application was not launched on behalf of the winning party in HH 484/13 nor did he file an affidavit supporting the application. He has however filed heads of argument in support of the applicant. He clearly is approbating and reprobating. This ought to be rightly viewed as collusive behavior between kith and kin to defeat the property right of the first respondent.

There is a further reason why this application should fail. Applicant seeks to clothes the application with a gown of an interim interdict yet there is nothing interim in the order sought. In truth therefore applicant urges this court to grant a final order when at best applicant has only probably proved only a prima facie case. The argument becomes even more convoluted when regard is had to the submissions in the heads as compared to the prayer.

In the end I dismissed the application with costs save for the remarks regarding the order for costs in HC 10802/13.

Mutangamira & Associates, applicants' legal practitioners
Mawere & Sibanda, 1st respondent's legal practitioners
Chambati & Mataka, 2nd respondent's legal practitioners
Nyamayaro Makanza & Bakasa, 3rd respondent's legal practitioners