COUNTRY CLUB TWENTY-TEN (PRIVATE) LIMITED
versus
THE COUNTRY CLUB
and
MARGOE KEENIE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 9, 19, 20 June & 4 July 2017

Urgent chamber application for execution pending appeal

T Magwaliba with *J Mutevedzi*, for the applicant
S M Hashiti with *K Kachambwa*, for the respondents

TAGU J: This application as I will demonstrate below has a checked history and was punctuated by episodes of drama. On the 17th May 2017 in Case Number HC 3855/17 this court granted an interim interdict in favour of the applicant Country Club Twenty-Ten (Private) Limited. Dissatisfied by the Interim Order the respondents filed a Notice of Appeal in the Supreme Court on the 29th May 2017 in Case Number SC 325/17. The appeal is still pending.

In their Notice of Appeal to the Supreme Court the respondents stated among other things that in terms of s 43 (2) (d) of the High Court Act [*Chapter: 7.06*] appellants do not need leave from this court to note this appeal. They said further that execution of the judgment appealed against is hereby suspended pending the hearing of this appeal.

This prompted the applicant to file an urgent chamber application for leave to execute the order in HC 3855/17 pending appeal.

At the hearing of the urgent chamber application Advocate *S M Hashiti* assisted by *K Kachambwa* raised a preliminary point. The preliminary point was to the effect that there was no application before this court because the respondents filed their Notice of Appeal with the Supreme Court without firstly obtaining leave from this court to appeal since the order they seek to appeal against is an interlocutory order. They said the purported appeal is therefore a sham and the decision made illogical. Since the appeal is a nullity it follows therefore that there is nothing to execute pending nothing. In short they submitted that the application for

leave to execute pending appeal was prematurely made and must be struck of the roll. Reference was made to the cases of-

1. *Jesse* v *Chioza* 1996 (1) ZLR 341 (S),
2. *Stumbles And Rowe* v *Mattinson & Ors* 1989 (1) ZLR 172 at 178,
3. *Golden Reef Mining (Pvt) Ltd and Ferbit Investments (Pvt) Ltd* v *Mnjiya Consulting Engineers (Pty) Limited and The Sheriff* HH-631/15 and
4. *MacFoy* v *United Africa Co. Ltd* [1961] 3 ALL ER 1169 also cited in *Jensen* v *Acavalos* 1993 (1) ZLR 216.

In response to the preliminary point Advocate *Magwaliba* referred the court to paragraphs (b) and (c) of the respondents' Notice of Appeal filed in the Supreme Court wherein the respondents stated that they did not need the leave of this court to note the appeal and that execution of the judgment appealed against is suspended pending the hearing of this appeal. He further referred to paragraph three of a letter written by the respondents' legal practitioners wherein they stated that-

> "In any event, anything and everything your client purports to do in seeking to enforce TAGU J's judgment is now water under the bridge in view of the Notice of Appeal just filed and served on yourselves."

Mr *Magwaliba* assisted by *J Mutevedzi* said the urgent chamber application for leave to execute pending appeal was a direct reaction to the paragraphs cited in the Notice of Appeal as well as the letter of the 29th May 2017.

According to Mr *Magwaliba* as long as the Notice of Appeal has not been withdrawn it means the applicant cannot enforce the judgment, and the Sheriff may not effect any writ based on it. He further submitted that the opposing papers filed by the respondents did not raise the argument that is being raised by Mr *Hashiti*. He said it was wrong for Mr *Hashiti* to urge this court to declare that the Notice of Appeal filed in the Supreme Court was a nullity. Reference was made to the case of *Guwa & Anor* v *Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380.

In response Mr *Hashiti* conceded that the preliminary point he raised, he took it on his own initiative, and further argued that since the High Court has inherent jurisdiction, unlike the Supreme Court, it has power to declare that the Notice of Appeal is invalid and consequently the application by the applicant for leave to execute pending appeal be struck off the roll.

I do agree with Mr *Hashiti* that the Notice of Appeal filed in the Supreme Court is of no force or effect and is liable to be struck off the roll for the simple reason that when the Notice of Appeal was filed, the respondents did not seek the leave of this court first. I agree entirely that a judge of the appeal cannot declare the Notice of Appeal to be null and void in chambers. That can only be done when the full bench of the Supreme Court sits. While this court has power to declare that the Notice of Appeal now in the Supreme Court is null and void, this court cannot do so now since that appeal does not lie before this court. It is the full bench of the Supreme Court that can do so. What this court can only do is to take the validity or otherwise of the Notice of Appeal when it decides on the prospects of success of that appeal. There is a great likelihood that that Notice of appeal may be struck of the roll for failure to first seek the leave of this court.

I therefore agree with Mr *Magwaliba* that as long as the Notice of Appeal has not been withdrawn from the Supreme Court, and as long as the Registrar has not been advised of its withdrawal, the applicant and the Sheriff cannot enforce the judgment of this court granted on the 17th May 2017 in case HC 3855/167. In my view an application for leave to execute pending appeal is warranted. The preliminary point is therefore dismissed.

This brings me to the issue of costs. The respondents had urged the court to struck off the roll the application and that costs should follow the outcome. See *Passmore Matanhire* v *BP Shell Marketing Services (Pvt) Ltd* SC -113 04.

On the other hand the applicant submitted that the conduct of the respondents be censored and that the application be dismissed with costs.

It is clear that the respondents have contradicted themselves. On one hand they purported to have filed a Notice of Appeal and on the other hand turn around and said what is purported to be a Notice of Appeal can best be described as a sham and illogical. For this the respondents have to be visited with an order for costs.

In the result it is ordered that-

1. The preliminary point is hereby dismissed.
2. The matter has to be heard on the merits.
3. The respondents are ordered to pay wasted costs.

Having made the above ruling and hoping that the parties were to address the court on the merits, further drama unfolded. Mr *Hashiti* took another point *in limine*. This time he applied that this court should recuse itself. He said the application was not being sought on a

personal basis that the court is conflicted or biased. He made it clear that the court was not biased but that it was being made on what he termed institutional bias. He said justice must not only be done but must be seen to be done. He further said that while the practice is that the Judge who sat on a matter is the one who must sit on a consequential application such as an application for leave to execute pending appeal, there is an inherent discomfort in that the Judge would be placed between two cross roads. Having made his earlier decision the Judge is being asked to revisit his own decision hence it is anomalous and another Judge who is not tainted must hear the application for leave to execute pending appeal to avoid not personal but institutional bias. He said in the event that the court refuses to recuse itself then the respondents makes a second application that this matter be referred to the Constitutional Court in terms of s 69 of the Constitution which provides for a fair trial before an independent and impartial court since a Constitutional issue has arisen. He referred to an old case of *R* v *Phillip & Jack* 1892 (6) EDC 194 (Full citation not clearly captured).

Mr *Magwaliba* opposed both applications as a delaying tactic by the respondents who did not want the court to deal with the application on the merits. He said the practice is that points *in limine* must be raised at the same time. Further he argued that by its very nature an application for recusal is a serious one which must not be undertaken unless there is evidence of bias and another party must be advised in advance. He said the test to be applied is equally high. He cited the case of *President of the Republic of South Africa & Others* v *South African Rugby Football Union & Others* 1999 (4) SA 147 where it was held among other things that-

> "a Judge who sat in a case in which she or he was disqualified from sitting because, seen objectively, there existed a reasonable apprehension that such Judge might have been biased, acted in a manner that was inconsistent with section 34 of the Constitution of the Republic of S. Africa Act 108 of 1996 and in breach of the requirements of s 165 (2) and the prescribed oath of office. The application for recusal raised a constitutional matter within the meaning of s 167 (3) and it was the duty of the Court to give collective consideration to the question whether the Judges concerned should recuse themselves."

The application for recusal in that case was dismissed despite the fact that certain members of the court had been members of the political party of which the first and second appellants were members and that the President of the Court had had a longstanding relationship of advocate and client with the first appellant. The rational being that once one is appointed a judge one is able to discharge his duties fairly and without bias. Hence in the present matter there was no ground to impugn the conduct of the Judge (myself) and the practice that stood the test of time exists for good reason that the Judge who heard an earlier

matter must decide an application for leave to execute his own judgment pending appeal. Since the respondents said the present Judge is not biased then the application must be dismissed.

As regards the application for referral to the Constitutional Court Mr *Magwaliba* submitted that such referral in terms of s 175 of the Constitution of Zimbabwe can only be done where there is evidence. In the present case no evidence of bias has been led and the application must be dismissed with cost on the basis that it is frivolous and vexatious since no constitutional issue has arisen. The Respondents by admitting that this court is not biased therefore cannot rely on s 69 (2) of the Constitution of Zimbabwe which deals with hearings of a matter before an impartial and independent court since they have pointed that this court is impartial but sought to raise institutional bias.

On the 20th June 2017 after hearing submissions by both counsels on the two subsequent applications made by the respondents the court summarily gave a short *ex tempore* judgement in chambers and dismissed both applications without an order for costs and indicated that full reasons for the dismissal would follow after hearing submissions on the merits of the application for leave to execute pending appeal. There being no time left to hear the submissions on the merits the application was deferred to the 4th of July 2017.

Further drama then unfolded. On the 27th June 2017 the respondents instead of waiting to make submissions on the merits attempted to file another Notice of Appeal against this court's *ex tempore* judgment at the Supreme Court. The Registrar of the Supreme Court refused to accept it on the ground that it was incomplete as no order or judgment was attached thereto. On the 28th June 2017 and the 3rd of July 2017 the respondents wrote letters requesting for full judgment contrary to the court's order that a full judgment would follow after hearing submissions on the merits. Then on the 4th of July 2017 all parties appeared before the court but Mr *Hashiti* indicated that since the court was adamant that it wanted the parties to address the court on the merits of the application for leave to execute pending appeal advised the court that he and his clients were pulling out of the proceedings and asked to be excused. The court duly excused them and the applicant then made submissions alone. The application for leave to execute pending appeal then automatically became unopposed although the respondents had filed opposing papers. The court duly granted the application for leave to execute pending appeal without giving full reasons why it dismissed the

application for recusal and referral to the Constitutional court in view of the respondents' walkout.

However, for the completeness of the record the court in dismissing the two applications had said in brief that-

> "The practice that stood the test of time has always been that the Court or Judge who heard the matter is the same judge or court that is better placed to hear an application for leave to execute pending appeal. This can only be departed from where the judge/court is deceased and or is not available. *In casu* the question of bias whether institutional or otherwise, in my view does not arise because in an application for leave to execute pending appeal the judge is being asked to look at totally different elements from the initial case such as-
>
> (1) the potentiality of irreparable harm being sustained by the applicant if leave to execute is denied,
> (2) the potentiality of irreparable harm to be sustained by the respondents if leave to execute pending appeal is granted,
> (3) where there is potentiality of irreparable harm on both the applicant and or the respondents, the balance of convenience and
> (4) the prospects of success of the appeal.
>
> *In casu* in the absence of bias on the part of this court, the court will dismiss the first application and order that parties address the court on the merits.
> This brings me to the second application for referral to the Constitutional Court. I found this application to be without merit. It is frivolous and vexatious. I found that no constitutional question to have been raised. The second application is dismissed as well. There is no order as to costs. However, full reasons for dismissal of the two applications will follow later after hearing submissions on the merits."

When the respondents walked out of court and after hearing submissions from the applicant alone the court granted the following order-

TERMS OF FINAL ORDER

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

1. The operation of the provisional order granted by the Honourable MR. Justice Tagu on the 17th May 2017 under case number HC 3855/17 shall not be suspended by reason of the appeal noted by the 1st and 2nd Respondents to the Supreme Court under SC 325/17 or any other appeals, and shall have full legal effect regardless of such appeal, and Respondents be and are hereby ordered to comply with all its applicable provisions with immediate effect.
2. The Respondents pay the cost of this application on an attorney and client scale.

TERMS OF INTERIM ORDER GRANTED

1. That the 1st and 2nd Respondents and all the people acting through them be and are hereby interdicted from acting in any manner which interferes, obstructs Applicant's commercial activities at The Country Club pending the determination of the appeal filed by the 1st and 2nd Respondent under case number SC 325/17.
2. That the 1st and 2nd Respondent and all people acting through them be and are hereby interdicted from collecting membership monthly subscriptions payable to the Applicant by the membership of The Country Club pending the determination of the appeal filed by the 1st and 2nd Respondent under case number SC 325/17.

Mutamangira & Associates, Applicant' legal practitioners
Dube, Manikai & Hwacha, 1st and 2nd respondent's legal practitioners