CHARLES DUMISANI DUBE
versus
MAXINE MARIAN S MUGODO N.O
and
CITY OF HARARE
and
SALTANA ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 5 June 2019 & 19 June 2019

Chamber Application

INTRODUCTION

KWENDA J: This is a chamber application for leave to appeal against a judgment I handed down on 14 February 2019 ordering the parties to trial. The applicant is aggrieved by the judgment and intends to appeal, hence this chamber application. The application is pursuant to the provisions of s 43 (2) (d) of the High Court Act [*Chapter 7:06*].

> "43 (1) ---
> (2) No appeal shall lie
> (a) ---
> (b) ---
> (c) ---
> (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, ---" (the underlining is mine)

Section 43 (2) of the High Court Act does not present problems when a party is aggrieved by an order made in the course of proceedings and the presiding judge remains seized with the court file/record. The application for leave is naturally before that judge who is presiding. However, in a matter as the present where the effect of the interlocutory order was to convert a court application to action proceedings the judge who made the order does not remain seized with

the matter and the file. Accordingly, and very often a chamber application for leave to appeal is placed before a judge other than the one who prepared the judgment. The Act does not prohibit that but it appears to me that the s 43 (2) b is unambiguous in as far as it provides that leave must be sought from that judge who prepared the judgment or gave the order appealed against. The reason is obvious. The judge who made the order is best placed to dispose of the application quicker since her or she is already familiar with the circumstances of the matter. I am fortified in my belief by the different wording used in paragraphs (c) and para (d) of subsection (2) of s 43 of the High Court Act. In terms of paragraph (c) the party intend on appealing requires leave of either "the High Court or the judge who made the order--." By contrast in an appeal against an interlocutory order leave of "that judge "is required. In my view the 'that' was intended by the legislature to be a determiner, which means the judge must be preferred unless circumstances or the convenience of the circumstances dictate otherwise.

The Legislature found it prudent to subject the right to appeal from an interlocutory order or judgment to the scrutiny, first, of the judge who prepared the judgment or gave the order. I can therefore competently determine this application. The applicant should therefore satisfy me that he has reasonable prospects of success on appeal. The applicant cited useful authority *Pilane and Another* v *Pheto and Others* (CA 582/11) [2012] ZANWHC10.

> "It is trite law that in an application for leave to appeal, it is incumbent upon an applicant to show the existence of reasonable prospects on appeal. Put differently, an applicant must show that a reasonable possibility exists that another court on appeal may come to a different decision on the facts than what the court of first instance had arrived at. Furthermore in an appeal to the Supreme Court of Appeal, an applicant must also show that the case is of substantial importance that warrants it to be referred to the Supreme Court of Appeal."

BACKGROUND

The applicant instituted proceedings in this Court under case no HC 4773/18. He sought an order declaring him either the lawful owner or lawful holder of rights and interest in a certain immovable property known as Stand 7863 Warren Park, Harare. As additional relief he prayed for an order compelling the second respondent to transfer rights and interest in the property to him.

I heard the matter. After hearing argument, I ordered as follows:

(1) The matter is referred to trial
(2) Applicant, who then shall be the plaintiff shall commence the process by way of summons setting out his claims in terms of the rules

(3) Phillipah Rambanepasi shall be cited as fourth defendant

(4) There shall be no order as to costs.

Applicant is aggrieved by the order. He intends to appeal against the judgment. He has filed this application for leave in terms of s 43 (1) (d) of the High Court Act (*supra*). His grounds of appeal appear on the draft Notice of Appeal submitted with the application and stated in greater detail in the founding affidavit. I will paraphrase the grievances hereunder. He submitted that:

(1) The order requiring fresh summons to be issued is incongruous with referral of the matter to trial and is, with the greatest respect, bizarre.

(2) The inclusion of a party who was not before the court and who never made an effort to be joined as a party, who was not before the court, is not only, with respect, unusual or somewhat odd but is also unwarranted.

(3) The Honourable Court erred at law by referring the matter to trial and ordering the applicant to issue fresh summons regardless of papers filed of record which it could have easily ordered to stand as pleadings. In so doing the Honourable Court in effect dismissed the application when the facts placed before it warranted that the application be granted as prayed

(4) The court erred at law in making a finding that Mrs Phillipah Rambanepasi had been left out deliberately in the proceedings yet the application was on 28 May 2018 before Mrs Phillipah Rambanepasi issued summons on 21 June 2018. The applicant was not aware of Mrs Phillipah Rambanepasi's claim

(5) The Honourable Court grossly misdirected itself and consequently erred at law by not considering the import of a letter which proved that Mrs Phillipah Rambanepasi had been refunded in pursuance to a court order. There was therefore no material dispute incapable of resolution on the papers. It is clear that third respondent had resolved Mrs Phillipah Rambanepasi's claim. It was a gross error for the Court to fail to consider that crucial evidence before it.

In considering the prospects of success of appeal I must address all the grievances *in seritium.*

Grievance No. 1

Where the court arrives at the conclusion that matter before it brought by application raises a material dispute of fact not capable of resolution on the papers it can do either two things. It can dismiss the application if the material dispute was in all probabilities reasonably anticipated by the applicant at the time he/she commenced the proceedings. In other words, a litigant who is aware of a dispute which cannot be resolved on the papers risks having his application dismissed if he/she adopts the application procedure. Alternatively, the court can in the exercise of discretion order the parties to trial. The court may, in its discretion, give directions as to how the matter will proceed. In practice courts have allowed the notice of motion to stand as a summons in the action. It is however competent for a court to order that the matter be commenced as an action so that issues may be clearly defined. The Court orders the parties, and not the papers, to trial. The court can simply order the parties to trial without giving further directions. See Herbstein & van Winsen *Civil Practice of the High Courts of South Africa* 5 ed Volume 2 at pp 466 & 467. It is trite that action proceedings are commenced by way of summons. The procedure of recasting pleadings is not alien to our High Court procedure. Ordinarily in proceedings commenced by way of summons, in the event that the plaintiff applies to make amendments to the summons and/or declaration and the amendments are numerous, the rules of the High court encourages the plaintiff to redraft or recast the summons or declaration incorporating the amendments. See r 133 of the High Court rules of 1971. I therefore conclude that the order I gave is not bizarre.

Grievance No. 2

Rule 87 (2) b of the High Court Rules 1971 empowers the court, at any stage of proceedings, to *mero motu* order joinder of a party if such a person ought to have been joined as party or if the joinder is necessary to ensure that all matters in the cause may be effectively and completely determined or adjudicated upon as long as such person is not being joined as the plaintiff. I considered that the circumstances cried out loud out for that course of action. The order is therefore not odd and unusual as the rules provide for it. Mrs Phillipah Rambanepasi is in occupation of the stand forming the subject matter of the dispute. She is before this court by way of action under case no HC5759/18 seeking an order declaring her the owner of the same property. That matter is pending. The fact that Mrs Rambanepasi issued out her summons after this application had been commenced does not detract from the fact that she was already in occupation of the property prior to this application or that she has an interest in the property. I thought it was

obvious that for a declaratory order by this court to have final and definitive effect, her interest cannot be ignored. It boggles the mind why he wants to exclude someone who has made her interest known not only by issuing summons but by taking occupation as well.

Grievance No. 3

The applicant submits that the court in effect dismissed his application. I did not determine the merits of the dispute. Actually, the applicant took the view that my order was interlocutory, hence this application for leave to appeal. The relevant provision of the High Court Act [*Chapter 7:06*] is section 43 which I quote hereunder: -

> "43 (1) ---
> (2) No appeal shall lie
> (a) ---
> (b) ---
> (c) ---
> (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, ---" (the underlining is mine)

I did not dismiss the application. The matter is not *res judicata.* The applicant still has the opportunity to pursue the relief sought after a trial. My order did not shut the door. The problem emanates from applicant's interpretation of nature of the order which I made which I believe is wrong. He actually contradicts himself. Otherwise he would not have applied for leave to appeal.

Grievance No. 4

Applicant knew of Mrs Rambanepasi's occupation of the property prior to issuing summons. He knew before setting down the matter that Mrs Phillipah Rambanepasi had a pending claim in which she wanted to be declared the owner. Mrs Phillipah Rambanepasi.s occupation of the property in her own right is the circumstance that reveals a dispute. It is not the timing of her summons. In any event, even assuming applicant became aware of her interest subsequent to filing his application, he was still required to apply for her joinder. The rules permit joinder at any stage in the proceedings.

Grievance No. 5

The applicant says Mrs Rambanepasi was refunded and so she no longer has interest in the property. The letter from third respondent inviting her to visit its offices "for arrangements that you collect (her) refund as per summons in Case no 2009/11, against Saltana' is part of the papers before me. The letter is dated 15 August 2011.

The difficulty is that there is no evidence that she attended to accept the refund. In any event she would not be in occupation seven years later. She would not be issuing summons in 2018. That is an issue which can only be resolved at a trial in which she is involved.

Other disputes

There is no way this court could declare the applicant the owner of the property when in the same application he concedes that he does not have title because he is still at the stage of compelling transfer to him by another. Clearly the person from whom he intends to obtain transfer could be the owner. I say "could' because the papers lack clarity in that respect.

The Law

Declarator

A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. See Herbstein & van Winsen *Civil Practice of the High Courts of South Africa* 5 ed Volume 2 at p 1428. At p 1438 the learned authors list some of the factors which can be taken into account by the court in exercising its discretion whether or not to grant or refuse an application for a declaratory order. Among the considerations are the utility of the remedy, the existence or absence of an existing dispute. See also the cases cited.

In the matter of *MDC* v *President of Zimbabwe and Others* 2007 (2) ZLR 255 the court gave the following useful guidelines in deciding an application for a declaratory order. In an application for a declaratory order the subject of the enquiry is a disputed right or obligation as case may be. When an applicant approaches the court for a declaratory order he/she is not seeking a legal opinion on an academic issue or abstract. There ought to be interested parties upon whom the declaratory order will be binding.

The dispute in this matter involves a person who has not been cited by the applicant. I directed the applicant to proceed by way of action because there are issues concerned with the contested rights to the property which can only be resolved after hearing evidence. The applicant avers that Phillipah Rambanepasi was reimbursed. However, I remain of the view that Phillipah

Rambanepasi would not be before this court seeking to be declared the owner of the same property if she received a refund and accepted it. That remains an assertion which must be put to her. The court does not hold her brief but her continued occupation and the fact that applicant is not simply telling her to leave by word of mouth makes the assertion that she was reimbursed improbable. If indeed the applicant is *bona fide*, I do not see why he does not wish to notify Phillipah Rambanepasi of the relief he seeks.

CONCLUSION

I am not persuaded that the intended appeal has prospects of success on appeal. Applicant seems to suggest that a different judge could have given further directions. Clearly that is an exercise of discretion after ordering the parties to trial. However, in my view, the crux of the matter is that when a court finds that there is a material dispute which can only be resolved at a trial it can refer the parties to trial. The effect of such an order is to abstain from dismissing the application and grant the applicant leave to proceed by way of action. Such an order does not become incompetent just because the court did not convert any part of the papers into pleadings. The law does not compel the court to order the notice of motion to stand as the summons. The applicant has not been deprived of the relief that he wants. It might still come his way if he demonstrates that Phillipah Rampanepasi has no justification to compete for the property. The appeal appears to be motivated solely by the desire to obtain an order of this court which is adverse to another person known to him, without the knowledge of that person. In circumstances where this Court did not shut the door, I do not believe that the "issue is of such substantial importance that warrants it to be referred to the Supreme Court" see the case law cited by applicant.

In the circumstances I order as follows:

1. Application of leave to appeal is refused.
2. There shall be no order as to costs.

C Kuhuni Attorneys, applicant's legal practitioners
Jarvis.Palframan, 3rd respondent's legal practitioners