REPORTABLE ZLR (27)

Judgment No. SC 34/07
Civil Application No. 163/07

TOTAL MARKETING ZIMBABWE (PRIVATE) LIMITED v POLLYLAMP INVESTMENTS (PRIVATE) LIMITED t/a LOE CHRIS AUTO

SUPREME COURT OF ZIMBABWE
HARARE, JULY 26, 2007

H Zhou, for the applicant

O Masendeke, for the respondent

Before CHEDA JA: In Chambers in terms of r 31 of the Supreme Court Rules.

The applicant approached the High Court with an urgent chamber application seeking a Provisional Order with the following terms.

"TERMS OF FINAL ORDER SOUGHT

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

1. that the cancellation of the agency relating between the applicant and the respondent be and is hereby confirmed.

2. the respondent shall pay the applicant's costs on a scale of legal practitioner and client.

INTERIM RELIEF GRANTED

1. Pending granting of the final order, the respondent shall, upon service on it of this Provisional Order, forthwith deliver to the applicant –

(a) the applicant's Mercedes Benz C240 registration AAG 5786 together with the keys and the registration book;

(b) the applicant's Volvo S40 Registration AAG 5881 together with the keys and the registration book."

The application was filed at the High Court on 13 July 2007.

On 19 July the applicant filed with the Supreme Court an urgent chamber application in which he stated as follows:

> "However, when the urgent chamber application was placed before the Honourable Mr Justice Bhunu, he declined to deal with it and ruled that it was not urgent".

He then prays that this Honourable Court grants this application.

The order that he seeks is exactly the same one that he sought at the High court.

The application is opposed. The respondent says the decision by the High Court Judge was interlocutory and the applicant needed leave from the Judge to note this appeal. Without such leave the matter is not properly before the Judge of the Supreme Court.

The Judge at the court *a quo,* having determined that the matter was not urgent, did not deal with the merits.

This means the matter is still pending before the High Court.

I agree with the observations made by the respondent.

The applicant is actually asking the Supreme Court to take over a matter that is pending at the High Court and determine it on the merits as a court of first instance.

This is so because the applicant filed this application with an affidavit on the merits of the matter before the High Court and did not provide any judgment from the High Court or seek the High Court Judge's reasons for the decision that he made.

The applicant is clearly trying to cut across the clear procedural Rules of court, a situation that is not permissible.

This Court cannot be used to take over and hear applications from the High Court just because a litigant thinks that his application is urgent.

This can only be done where the High Court has given reasons for declining to deal with a matter, in which case it must be shown that it erred in arriving at such a decision.

In *Crouch v Dube* 1997 (ZLR 427) it was held that:

> "Where a lower court exercises a discretionary power, an appeal court has to decide firstly what was the nature of the discretionary power.
>
> There are two categories of such powers. The first relates to matters having the character of being so essentially for the determination by the lower court that it would ordinarily be inappropriate for an appeal court to substitute its own discretion.
>
> The second relates to matters having the character of being equally appropriately determinable by either court.
>
> Where the discretionary power is of the first kind, the appeal court has no jurisdiction to substitute its own discretion unless the lower court's exercise of its power was not judicial."

In *ANZ Grindlays Bank (Zim) (Pvt) v Hungwe*, 1994 (2) ZLR 1 (S) KORSAH JA stated:

> "I venture to say it would be highly irregular, if not unfair and dangerous, for an appellate court to assume the jurisdiction of a court of first instance, and pronounce on issues which are properly recognizable in a court of first instance, but have not been canvassed before that court. To do so would be to deprive the losing party of the right to appeal should our determination be wrong."

I agree entirely with the above observations.

The merits in the application before the High Court were not considered and as such it would be wrong for me to take it upon myself to consider them as if this is a court of first instance.

It follows that this application cannot be granted and I order as follows:

The application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Hogwe, Dzimirai & Partners, respondent's legal practitioners