HH 504-21
HC 4529/21

EDWARD MARK WARHURST N.O
versus
JACOBUS KOTZE CARSTENS
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
THE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 13, 14 and 15, 17 and 22 September 2021

URGENT APPLICATION – LEAVE TO EXECUTE PENDING APPEAL

E. Mubaiwa, for the applicant
F. Munyamani with *R Nyamutowa,* for the 1st respondent

CHIRAWU-MUGOMBA: This matter was placed before me as an urgent application for leave to execute pending appeal. The background is as aptly captured in HH 424-21. In that matter, the court granted an interim order which for the sake of convenience is captured hereunder.

INTERIM ORDER GRANTED

Pending finalisation of this matter an interim order be and is hereby granted in the following terms:-

1. First respondent is directed to surrender the books of account, gold and assets of Rolldice Mining Services (Pvt) Ltd to applicant within 24 hours of this order consistent with applicant's directive of 22 June 2021.

2. First respondent is barred from accessing Gloy Mine or any business premises or place of business or place of operations of Rolldice Mining Services (Pvt) Ltd, and from in any way interfering with applicant's official duties and operations at the mine.

The first respondent has noted an appeal to the Supreme Court against the interim order and has taken seven grounds as follows:-

1. The court erred at law and in fact in its finding that the appellant enjoyed the right of use and occupation of the house on Gloy Mine by reason of his employment by Rolldice Mining Services (Pvt) Ltd when in fact the appellant is the owner of the mining claims where the house is located and in turn owner of the house.

2. The court *a quo* erred at law and in fact in ordering the appellant to vacate from his accommodation at Gloy Mine under circumstances where the first respondent failed to show that he enjoys greater right to the accommodation than that of appellant.

3. The court a *quo* erred in ordering the appellant to surrender gold to the first respondent in a manner that offends the Gold Trade Act.

4. The court *a quo* erred at law and in fact in failing to consider that the matter was already *lis pendens* between the parties by reason that a prior matter between the same parties pertaining to the same matter in HC 3084/21 remains pending before the court.

5. The court *a quo* erred in failing to consider that the non-joinder of the Master is material to the matter.

6. The court *a quo* erred by failing to consider the legality of the first respondent's action when he delegated his functions as Judicial Manager to the deponent of the founding affidavit and the effect of the delegation to the application.

7. The court *a quo* erred in failing to consider the effect of citing the third respondent as such in circumstances where the third respondent does not exist as a party to litigation.

CHIDYAUSIKU CJ, in *Zimbabwe Mining Development Corporation and anor* v *African Consolidated Resources plc and ors,* 2010 (1) ZLR @ 37 E aptly stated that ,

> "At common law the noting of an appeal against a judgment suspends the operation of that judgment. It is also trite that at common law the court granting the judgment enjoys the inherent jurisdiction to order the execution of the judgment despite the noting of an appeal".

In my view, an application to execute a judgment pending appeal is one which must be viewed from the background of the constitution. Section 56(1) states that all persons are equal before the law. Section 69 makes provision for the right to a fair hearing. Potentially

granting such an application may infringe the rights of a respondent in that their appeal to the Supreme Court may end up being an academic exercise. The beauty of the law however is that, there are specific considerations that a court must make in such matters. To that extent, I can do no better than quote extensively from the judgment of CHAREWA J in *Premier Medical Aid Society* v. *Mandishona,* HH 219-17 as follows.

> **"THE LAW**
> **The requirements to succeed in an application for leave to execute pending appeal.**
> The Supreme Court has settled the law governing an application for leave to execute pending appeal (in Net One Cellular (Pvt) Ltd v Net One Employees & Anor 2005 (1) ZLR 275 (S) @281A-D) The markers laid down by the Supreme Court are that the court to which such an application is made has a very wide discretion whether to grant or refuse such leave. In exercising such discretion, the court must determine what is just and equitable having had regard to the following requirements:
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> i. The potential for the appellant (respondent in the application) suffering irreparable harm or prejudice should leave be granted;
> ii. The other side of the coin being the potential for the respondent (applicant in the application) to suffer irreparable harm or prejudice should the leave to execute be denied;
> iii. The balance of hardship or convenience should there be potential of irreparable harm to either the appellant or the respondent; and finally
> iv. The prospects of success on appeal. In this regard, the court must consider whether the appeal is frivolous and vexatious, or is not *bona fide*, either because it is not a genuine search to reverse the judgment but is meant to gain time or harass the other party.
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> **The requirements to withstand an application for leave to execute pending appeal**
> Therefore, in order to succeed against an application to execute pending appeal, the respondent must show that
> i. There are good or reasonable prospects of success on appeal,
> ii. The potential harm in allowing execution pending appeal is irreparable; and/or
> iii. The balance of hardship weighs in its favour".

It seems to me, the proper approach will be to start with prospects of success on appeal, an approach that the Constitutional Court adopted in *Streamsleagh Investmensts (Pvt) Ltd.* v *Autoband Investments (Pvt) Ltd*, CCZ 45/14. Invariably the court is called upon to reflect on the grounds of appeal filed before the superior court. In its opposing affidavit the first respondent raised a point *in limine* to the effect that the deponent to the founding affidavit has no right at law to do so on the basis of delegation. It is noted that this issue is one of the grounds of appeal and will therefore be addressed accordingly. Although the issue of urgency was raised in the first respondent's opposing affidavit, it was not pursued at the hearing. It is also recorded that the first respondent's legal practitioner Mr *Munyamani* with the concurrence of co-counsel Ms *Nyamutowa*, conceded that ground 4 of the appeal has no

merit. This concession is well made since as stated in HC 3646/21 (HH 424-21), a notice of withdrawal with costs tendered was placed before the court.

Mr *Munyamani* also conceded that grounds 1 and 2 of the appeal are interlinked. These two grounds are premised on the contention by the first respondent that he did not enjoy right of use and occupation of the house on Gloy Mine by reason of his employment by Rolldice Mining Services (Pvt) Ltd but on the basis that he is the owner of the mining claims where the house is located. It is noted that the first respondent was dismissed from the employee of Rolldice Mining Services and further that the labour officers order stipulates that having been suspended, the first respondent's entitlement to such benefits as accommodation ceases and he is required to vacate the house. Such order is still extant. With respect to ground 2 specifically there is a further contention by the first respondent that the applicant does not enjoy a greater right to the accommodation. The applicant in *casu* approached the court in his capacity as a judicial officer and he is entitled to ensure that all the assets of the company are preserved. More poignantly, the two grounds address issues that are not part of the interim relief. As correctly submitted by Mr *Mubaiwa,* it is clear from the interim order that there is no issue of vacation or ownership but a prohibition pending the return date of accessing the place of business. The first applicant has therefore appealed against a non-existing order.

On ground number 3, Mr *Mubaiwa* submitted that the issue of contravention of the Gold Trade Act [*Chapter 21:03*] was never pleaded and only appeared in the first respondent's heads of argument in HC 3646/21. Mr *Munyamani* submitted that it is a question of law that can be raised at any time. Mr *Mubaiwa* made reference to the decision in *T.N Harlequin Luxaire Ltd and anor* v *Quest Motors Manufacturing (Pvt) Ltd,* 2018 (1) ZLR 652 on the principles relating to the raising of a point of law. That case confirms the long held position of the law that a question of law may be raised or advanced for the first time on appeal and similarly in any matter before a court provided that it does not cause prejudice. MAKARAU JA (as she then was) eloquently @ p 655 – C-D stated as follows:-

> "The rationale behind allowing the introduction of a point of law on appeal for the first time is that the appeal court is duty bound to always to always come to the correct position of the law on the issues that were before the court *a quo* as covered by the pleadings. It is therefore inimical or contrary to its very existence for such a court to overlook the correct application of the law merely on the basis that it has been argued at a late stage in the proceedings".

More critically, @ p 655-656 G-A that,

> "A reading of the decision in *Cole* vs *Government Of the Union of SA(supra)* seems to suggest that the permissible point of law being raised for the first time on appeal must be fatal to one or more of the contentions of the other party. Indeed, it would serve no purpose for the appellant to raise a point of law that does not meet the respondent's case in a material way. In other words, it would be pointless to raise a point of law that is not dispositive of the whole or part of the appeal".

In my view, the issue of the Gold Trade Act is neither here nor there. The interim order does not 'award' the gold to the applicant in his individual capacity but in his capacity as the judicial manager. Therefore issues of contravening the Act do not arise. In any event the interim order is very specific that the gold and other assets are of Rolldice Mining Services (Pvt) Ltd.

Mr *Munyamani* was very forceful in advancing ground number 5 of the appeal relating to non-joinder of the Master. On the other hand Mr *Mubaiwa* submitted that the issue raised by that ground of appeal related to the non-consideration of the non-joinder and not that the court erred in not ordering joinder. This is based on the words, "in *failing to consider".* The court as per 3 of the cyclostyled judgment did consider joinder but dismissed the issue. In any event, non-joinder is not fatal. It all depends on the relief sought. The application was filed and heard before the coming into effect on the twenty- third of July 2021 of the High Court Rules, 2021. In my view, ground 5 has no merit for the very reason stated by Mr *Mubaiwa.* Order 13, r 87 (1) of the repealed High Court Rules, 1971 makes it clear that non-joinder is not fatal to a cause or matter. It is trite that a provisional order is granted on the basis of a *prima facie* case – see OR 32 r 246 (2) applicable at the time of the hearing of the case and now also r 60 (9) of the High Court Rules, 2021. The relief sought in the interim did not depend on the Master being a party. In any event, part of the duties of the judicial manager is to report to the Master and hence no prejudice was suffered. See *Amalgamated Engineering* v *Minister of Labour* 1949 (3) SA 637.

With regard to ground number 6, a reading of the first respondent's notice of opposition in HC 3646/21 reveals that only two points *in limine* were raised that the court dealt with. The issue of delegation was as a matter of fact raised as part of the merits and was linked to the fact that the Master ought to have been cited. The court noted on page 3 of the cyclostyled judgment that the first respondent has since filed an application for the removal of the applicant as judicial manager which is the proper forum for raising such issues of delegation.

Ground 7 of the appeal addresses the issue of citation of the third respondent as a party. In my view, there was no need for the court *a quo* to consider it at all. This is as rightly pointed out by Mr *Mubaiwa,* due to the fact that the third respondent is only relevant at the confirmation stage as per paragraph 3 of terms of the final order sought.

It should be noted that the first respondent's opposing affidavit is tantamount to having another bite at the cherry without addressing the issue of prospects of success on appeal. In the final analysis, there is very little prospect of success in the appeal and the applicant cannot be faulted for holding the view that the appeal was filed solely to frustrate the execution of the order. In other words that the appeal is frivolous and vexatious – see *Kyriakos and anor* v *Chasi and ors,* 2003(2) ZLR 399(H).

Mr *Mubaiwa* submitted that the applicant will suffer serious prejudice and hardship should the order not be granted. The first respondent has refused to surrender the assets of the company. There is risk that he will sell the assets, destroy or manipulate books. He has already been found in the labour disciplinary proceedings to have misappropriated funds of the company. The applicant on the other hand is concerned about the survival of the company. Mr *Munyamani* submitted that the first respondent will suffer undue hardship since he will be evicted from a house that he owns. He contends that he has obtained a loan from Fidelity Refiners Printers through a mortgage bond obtained in his personal capacity. In support he attached an unsigned Notarial Special Covering Bond. As correctly pointed out by Mr *Mubaiwa,* the first respondent unwittingly aided the case of applicant for seeking leave to execute pending appeal. He 'confessed' that he intends to place assets of the company under a notarial bond thus prejudicing it. He placed before the court in *casu,* information that was not placed in HC 3646/21. Weighing the hardship and prejudice between the two parties, the balance tilts in favour of the applicant.

The court also raised the issue of appealing against an interlocutory order without leave – see *Hunt* v *Hunt,* 2000(1) ZLR 165 where it was held that a provisional order is an interlocutory order. See also *Total Marketing Zimbabwe (Pvt) Ltd* v *Pollylamp Investments (Pvt) Ltd,* 2007(2) ZLR 60 (S). This was after noting that the first respondent did not seek leave to appeal against an interlocutory order. Let me hasten to state however that non-suiting the first respondent is an issue that can only be dealt with by the Supreme Court.

Mr *Mubaiwa* made an application to the effect that should the court be inclined to grant the application, it should also make an order that any appeal filed by the first respondent shall be of no force or effect without leave of the court. An order granting leave to

execute pending appeal is interlocutory and leave to appeal is required. See *Gillespies Monumental Works (Pvt) Ltd* v *Zimbabwe Granite Quarries (Pvt) Ltd*, 1997(2) 436 (H). There is therefore in my view no need to include this provision in the order.

Costs are at the discretion of the court. In my view, the first respondent has noted an appeal solely to buy time. He should therefore meet the costs.

DISPOSITION

It is ordered that:-

1. Leave be and is hereby granted to applicant to execute the operative order granted in HC 3646/21 under judgment HH 421-21 pending the appeal noted by the first respondent to the Supreme Court in case number SC 301/21.
2. The first respondent shall pay costs.

Venturas and Samkange, applicant's legal practitioners
T. Pfigu Attorneys, 1st respondent's legal practitioners