GMP TRADING PRIVATE LIMITED T/A
GMP REAL ESTATE PRIVATE LIMITED
versus
JINAN MINING P/L

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 28 August 2018 & 14 September 2018

Pre-trial conference

V. Masaiti, for the plaintiff
Mrs *G. Dzitiro*, for the defendant

MUZOFA J: At the pre-trial conference convened before me the defendant intended to apply for amendment the plaintiff raised two points *in limine*. I decided to write a judgment due to the long and winding background to the case.

To put the matter into perspective, I must set out its genesis. The parties appeared before MUSHORE J in a pre-trial conference. The defendant made an application to amend its plea. By order dated 5 July 2018 (it is unclear whether the year is correct or there was a typographical error because it is evident that the matter was heard in July 2017) the application was dismissed. Thereafter the Judge gave certain directives in respect of the joint pre-trial conference minute that parties agreed to with assistance of the Judge. It is not in dispute that when the minute was eventually drafted, the defendant's legal practitioner declined to sign. Parties appeared again before the Judge, the plaintiff applied that the defendant's plea be struck off. The application was granted on 11 July 2017.

The defendant noted an appeal to the Supreme Court. The Notice of Appeal set out that

> "Take notice that appellant appeals against the whole final judgment of the High Court of Zimbabwe, per Mrs Justice MUSHORE, in case No. HC 1858/17 handed down at Harare on the 11th of July 2017."

Thereafter the plaintiff, the respondent in the appeal abandoned the judgment of 11 July 2017. The notice that was filed provided

> "TAKE NOTICE THAT the respondent hereby abandons the judgment of the High Court (per MUSHORE J) handed down on 11th of July 2017 under HH 632/17).

Judgment HH 632/17 is the written judgment of the hearing of 11 July 2017 (HC 1858/17). Parties agreed that the matter be referred back to the High Court for a pre-trial conference before a difference judge. Following the filing of the notice of abandonment the Supreme Court issued an order in the following terms:

> "IT IS ORDERED BY CONSENT THAT:-
> 1. The appeal be and is hereby allowed with no order as to costs.
> 2. The judgment at the High Court be and is hereby set aside.
> 3. The matter be and is hereby remitted to the High Court for continuation of proceedings, commencing with a pre-trial conference before a different judge."

This is how the matter came before me. Although the plaintiff had raised two points *in limine*, it abandoned one and pursued one that the issue on the amendment of plea is *res judicata*. The plaintiff submitted that the appeal was against the judgment of 11 July 2017 and not 5 July. These two judgments related to different issues. In the notice of abandonment the plaintiff abandoned the judgement of 11 July and not that of 5 July. The judgment of 5 July therefore is extant.

Further that although the grounds of appeal included issues relating to the judgment of 5 July, that ground of appeal was improperly before the Supreme Court. On the authority of *Jensen* v *Avacalos* 1993 (1) ZLR 216 (SC) it was submitted that a court can only deal with grounds of appeal that are properly before it and not make a determination on those improperly before it. I was also referred to the case on *Mine Mills Trading (Pvt) Ltd and 2 Others* v *NJZ Resources* (HK) Ltd SC 40/14 for further authority on that position.

In essence the plaintiff's issue is, the pre-trial conference should continue from after the order of 5 July, the application for amendment should not be heard since the issue was determined.

The defendant vigorously opposed the submissions by the plaintiff. The defendant submitted that I had directed that this is a fresh pre-trial conference and an application should be made. Further that the judgment of 11 July was the final order which overtook the Order of 5 July. The first ground of appeal before the Supreme Court related to the dismissal of the application for amendment. The grounds of appeal were properly before the Supreme Court. In considering the appeal and the notice of abandonment the Judges of Appeal applied themselves to the case and allowed the appeal. The two issues of 5 and 11 July were intertwined. Allowing the appeal meant the judgments of 5 and 11 July were set aside.

The remittal to this court for the continuation of the pre-trial conference should be interpreted to mean a fresh pre-trial conference where the application for amendment should be heard.

Further submissions were made as to the fact that *res judicata* does not apply where there is no final and definitive order.

The first issue for determination is whether the judgment of 5 July is extant or it was set aside. I have no doubt in my mind that it is extant for the following reasons.

Firstly, the notice of appeal to the Supreme Court spoke for itself. It said it was a notice to appeal against the whole judgment of 11 July. This is in line with r 29 (1) (a) of the Supreme Court Rules, 1964 which provides

> "(1) Every civil appeal shall be instituted in the form of a notice of appeal signed by the appellant or his legal representative which shall state-
> (a) The date on which, and he court by which, the judgment appealed against was given."

The requirement that the date of judgment should be set out is meant to draw the appeal court's attention to the exact judgment whose issues would be interrogated. It was precisely meant *inter alia* to avert confusion where several judgments are handed down. The date becomes instructive. In this case the defendant drew the appeal court's attention to the judgment of 11 July.

I am not persuaded that the issues of 5 and 11 July were intertwined. The judgment HH 632/17 is very clear. It struck off the defendant's plea. It did not address the application for amendment; no reasons were given in that judgment for the dismissal of the application for amendment. Even the submission that the judgment of 5 July was overtaken by the judgment of 11 July can only be a misplaced submission considering the facts of this case. The two judgments related to completely different issues and therefore how can one judgment subsume the other?

I accept the position that when the notice of abandonment was filed, it abandoned the judgment of 11 July and nothing further, this is a case of *res ipsa loquitur*, the notice is clear.

Secondly, even if the first ground of appeal before the Supreme Court related to the judgment of 5 July it was improperly before that Court and did not make it part of the 11 July judgment. The submission that the Supreme Court allowed the appeal therefore it set aside the judgment of 5 July is not correct.

The case of *Mine Mills* (*supra*) referred to by the plaintiff is apposite and on all fours with this case. The appellant's counsel in that case had noted an appeal against one judgment

of this court and included grounds of appeal in respect of a prior judgment in respect of preliminary issues. The appeal court declined to deal with the grounds of appeal relating to the prior judgment as they were not properly before it, at p 5 of the cyclostyled judgment it noted,

> "Mine Mills Trading stated in their notice of appeal that it was appealing against the judgment of 9 October 2013. The judgment of 29 May 2013 was not mentioned at all. If Mines Mills Trading had wished to appeal against both judgment then it should have stated this in the notice of appeal.
>
> It was for the above reasons that the court rules that the grounds of appeal relating to the judgement of 29 May 2013 were not properly before it and declined to hear argument in relation to grounds 1 to 5"

The case is authority that an appellant cannot introduce grounds of appeal from a judgment not identified in terms of r 29 (1) (a) of the Supreme Court Rules, 1964.

Similarly, in this case the judgment of 5 July was not identified as a subject of appeal; consequently the grounds of appeal even if introduced through the back door would be improperly before the appeal court. It means therefore, the setting aside of this court's decision only related to the judgment of 11 July. The judgment of 5 July therefore remains extant.

Res judicata is a form of estoppel which denies a party to reopen a matter where a final definitive judgment in respect of the same parties on the same issues has been issued. See *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316 B-C.

Since the application for amendment was dismissed by MUSHORE J on 5 July and no appeal was made. It means the issue was determined and cannot be revisited. I am alive to the submission that I said this is a fresh pre-trial conference. That statement did not then allow the application or the amendment. It only gave the defendant its right to heard on the issue so that it is not muzzled. It is only after being heard that the appropriateness of the application is decided.

Accordingly the point *in limine* be and is hereby upheld.

2. The application for amendment of plea is hereby dismissed.

Musunga & Associates, applicant's legal practitioners
Mutumbwa, Mugabe & partners, respondent's legal practitioners