

JOSEPH MUCHAPONDWA
and
VENENCIA MADAKE
and
THE PROVINCIAL MAGISTRATE, HARARE
and
EDSON MUVINGI
and
THE MESSENGER OF COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 24 February and 6 March 2006

Urgent Chamber Application

Advocate *Zhou*, for applicant
Mr *Magwaliba*, for 1st respondent
Mr *Bvekwa*, 3rd respondent

KARWI J: This is an urgent chamber application. The applicant is seeking the following interim relief;

- “1. The second, fourth and fifth respondent are hereby interdicted from transferring the immovable property known as Number 1110 South View Uplands, Waterfalls, Harare to the 3rd respondent.
2. The first respondent shall not enforce the orders granted by this Honourable Court in Case No. HC 6626/05 and by the Magistrate in Case No. 11317/05.
3. This provisional order shall remain in operation notwithstanding the noting of the appeal against it.”

The facts which give rise to this application are as a result of a relationship which went sour. The facts which are basically undisputed are disclosed by the applicant in his fending affidavit as follows: Applicant and defendant were lovers. They had not married and did not live together. They had their different lovers and would visit each other. They neither a common estate .. purchase any property firstly. The immovable property, stand number 1110 South View, Uplands,

Waterfalls, Harare, which is the subject of this dispute. Belonged to the applicant. He had purchased it alone in October 1999 before he even met the 1st respondent.

When the..... relationship went sour, 1st respondent issued summons out of the Magistrates' Court under case No. 11317/05 in which she alleged that the two were married and therefore claimed a division of the applicant's property. Notwithstanding his apportionment, the Magistrates' Court entered judgment in favour of 1st respondent *inter alia* as follows:

".....Hence No. 1110 South View, Uplands Waterfalls, Harare to be sold and the plaintiff (1st respondent in this case) to get 40% of the proceeds and the respondent (applicant in this case) 60% of proceeds."

The other was not accompanied by any reasons. The applicant was not legally represented in the matter. On 16th May 2005 applicant's legal practitioners filed a notice of appeal against that judgment. In response the 1st respondent filed an application for leave to execute the judgment pending the appeal, which application was granted the order for the distribution of the property. The order was granted on 18 July 2005 and that order was not accompanied by any reasons.

On 30 August 2005, applicant's legal practitioner filed an appeal against the judgment of the Magistrate Court granting 1st respondent leave to execute pending appeal.

On 14 October 2005 the applicant's Waterfalls property was advertised for sale in a newspaper. On 17 October 2005, applicant filed an urgent chamber application in this court seeking to prevent the sale of his property under case no. HC 5273/05. The application was dismissed by this court.

On 5 November, 2005, applicant through his legal practitioners wrote to the Provincial Magistrate stating that he had listed appeals against both judgments of the Magistrates' Court, and that the reasons in both cases had not been provided despite numerous requests for them. In response, the Provincial Magistrate indicated that she had given an instruction to stop the sale. She also indicated that the Magistrate who had given the judgments against applicant had resigned and that the reasons for the judgment could therefore not be given.

On 22 November 2005, applicant through his legal practitioners wrote to the Provincial Magistrate stating, *inter alia*, that in view of the failure by the presiding

Magistrate to give reasons for his orders, an application was being made to this court for these judgments to be set aside. In her response, the Provincial Magistrate reiterated that the reasons for the judgment could not be provided, and that applicant could proceed to apply to this court for those proceedings to be set aside.

On 29 November, 2005 an application to have the two orders by the Magistrate set aside was filed with this court by the applicant under Case No. HC No. 6252/05. That application is still pending.

On 19 December 2005 1st respondent filed a chamber application in Case No. HC 6626/05 which is now the subject of the Supreme Court Appeal. Applicant filed opposing papers in that application. The application was granted by this court. No reasons were given. The order granted was along the following terms:

- “1) The 1st respondent, shall upon service of this order by the Deputy Sheriff confirm sale in execution in this matter forthwith.
- 2.) The 4th respondent proceeds with distribution plan and transferring property to 3rd respondent forthwith.
- 3.) The 2nd respondent shall pay the costs of the application.”

Following the granting of the above order, the Provincial Magistrate confirmed the sale of the property in dispute to the 3rd respondent. The sale was confirmed on 9 February 2006.

Advocate *Zhou* argued on behalf of the applicant that for the purposes of this application for stay of execution all that this court must be satisfied with is that:

“Real and substantial justice requires such a stay or, put otherwise, an injustice would otherwise be done.”

See *Strivie v Strivie*, 1983 (4) SA 850 at 852 A, *Chioza v Independent Property Development (Pvt) Limited and Another* HH 76-94 at p3, *Murumbechi v Townsend* HH 185-90.

He submitted that there was an appeal pending against the judgment which 1st respondent seeks to enforce. If the appeal succeeds after the judgment had

been executed, and after the applicant's property has been transferred to the 3rd respondent, thewould be 1st repairable.

Mr *Magwaliba*, for the 1st respondent urged for the dismissal of the application on the basis that the appeals noted in this matter did not comply with order 31 Rule 1(1) of the Magistrates' Court, which provide that:

"Upon a request in writing by an party made within seven (7) days after judgment and before noting an appeal and open payment by such party of a fear of \$10 000 the Magistrate shall within fourteen days deliver to the clerk of court a written judgment which shall form part of the record showing:

- a) The facts found to be proved; and
- b) His reasons for judgment."

It was submitted that the first request for written reasons for judgment was made in November 2005 and therefore did not comply with the rules.

It was further submitted that in terms of Rule 2 Order 31 an appellant may file his appeal within twenty-one days of the judgment appealed against or fourteen (14 days) of the delivery to the clerk of court by the magistrate of the written reasons for judgment in terms of rule 1(1) whichever period is longer. It was peremptory that an appellant requests the reasons and the reckoning of time within which to appeal then commences from the date when the reasons for judgment would have been furnished to the clerk of court.

Mr *Magwaliba* further submitted that a notice of appeal which is filed without an appellant having requested in writing for reasons was a nullity. He cited the following case authority as having decided the issue according, *Shereni v Moyo*, 1989(2) ZLR 148 at 149B-C, *Fox and Carney (Pvt) Ltd v Sibindi*, 1989(2) ZLR 173 (s) at 178 B-181B, and *Kanengoni v Zimbabwe Spinners and Weavers (Pvt) Ltd* 1995(2) ZLR 348(s) 350F.

It was also submitted that the appeals having been noted without judgment cannot therefore be sustained. A magistrate in addition to having provided written reasons for judgment may be required to comment on matters of fact in terms of Order 31 rule 3. That does not take away the obligation of a litigant to request reasons for judgment before noting an appeal in terms of order 31 Rule 1.

The issue to be decided is whether or not an appeal is invalid if it is noted without the appellant having requested in writing and has been furnished with the reasons for a judgment or order. I do not agree with the submission by Mr *Magwaliba* that such an appeal is nullity. I equally do not agree with Mr *Magwaliba's* assertion that a judicial officer is not under obligation to provide reasons for his judgment or order. It is settled that:

"When a matter is opposed and the issues have been argued it is unacceptable for a court to make an order without giving any reasons for it, since that litigants are entitled to be informed of the reasons for the decision."

See Herbstein and Van Winsen, one Civil Practice of the Supreme Court of South Africa 4th Edition p. 679.

The rationale was for the above set out in *Botes & Anor v Nedbank Ltd* 1983(3) SA 27 at 27H.

"The first is that the judge who heard the exception and application to ... out made orders dismissing the exception and allowing, in part, the motion to ... out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues have been argued, the litigants are entitled to be informed of the reasons for the judge's decision. Moreso, a reasoned judgment may discourage an appeal by the law. The failure to state reasons have the opposite effect.

In addition, should the mater be taken an appeal, as has happened in this case, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did."

In *S v Makawa & Anor*, 1991(1) ZLR 142(SC) at 146 D-E, and *S v Mapiye*, s - 214/88, it was held that:

"Although there are indications in this case that the magistrate may have considered the case, a large portion of those considerations remained shared in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. See *R v Jokonya*, 1964 RLR 236G"

I agree with Advocate *Zhou's* submission that an appeal is noted not against the reason for a judgment but against the judgment or order itself. "There can be an appeal only against the substantive order made by a court, not against the reasons for judgment."

See *Administrator, Cape & Anor v Ntshwaqela & Ors*, 1990(1) SA 705 (AD) at 714 J-715D. *Herbsteni & Van Wunsen*, p 679, and *Buy Passenger Traugurt Ltd v Frazen* 1975(1) SA 269 AD at 278 A-E. In *Chidyausiku v Nyaqkabambo* 1987(2) ZLR 119(sc) AT 124 C it was held that:

"In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question. It must be lodged against the substantive order."

Contrary to what Mr *Magwaliba* stated in his submissions on the validity of an appeal which is noted in the absence of reasons for a judgment, Order 31 Rule 1 of the Magistrates Court (Civil) Rules deals with applications for reasons for judgment. It seems to me that the Rule is meant to regulate the *dies indicial* for the request for reasons and their provisions by the magistrate. The Rule clearly applies where there has been a written request for written reasons before an appeal has been noted. It does not apply in a situation where an appeal has already been noted. Order 31 Rule 2 does not even apply in this case. Order 31 Rule 3 applies where a notice of appeal has been filed in the absence of reasons for a judgment,

It seems to me therefore that the absence of reasons does not affect the validity of an appeal. I also agree with Adv. *Zhou* that in the circumstances of this case, once an applicant filed his notice of appeal, the magistrate is enjoined in terms of Order 31 Rule 3 to finish the written reasons for the judgment. It is the notice of appeal and not the written request, which should have triggered the provision of the written reasons for judgment by the magistrate,

Consequently, I am satisfied that real and substantial justice requires that a stay of execution of the judgment appealed against be granted. The appeals which are pending are not a nullity. They are indeed valid. I find in favour of the arguments by the applicant that there would be irresponsible harm if 1st respondent is allowed to execute the judgement and transfer to the 3rd respondent takes place. In any case, there is no prejudice to the 1st respondent if the execution is stayed to allow the applicant to prosecute his appeals. The only material prejudice which was pointed out by the 1st respondent was that passage of time would erode the value of her 40% share in the property due to inflation. While

it is time that this is the case, the situation applies to both the applicant and the 1st respondent.

In the result, application is granted in terms of the draft as follows:

That, pending determination of this matter, the applicant is granted the following interim relief:

1. The second, fourth and fifth respondents are hereby interdicted from transferring the immovable property known as Number 1110 South View, Uplands, Waterfalls, Harare to the 3rd respondent.
2. The first respondent should not enforce the orders granted by this court in case number HC 6626/05 and by the magistrate in case number HC 11317/05.
3. This provisional order shall remain in operation notwithstanding the noting of an appeal against it.