CHARLES NYACHOWE
versus
BOHEKE FARMING (PRIVATE) LIMITED
and
KENNETH VAUGHAN SHERRIFFS
and
COGHLAN WELSH & GUEST
and
MESSENGER OF COURT, NORTON
and
MINISTER OF STATE RESPONSIBLE FOR
NATIONALL SECURITY, LANDS, LAND REFORM
AND RESETTLEMENT IN THE PRESIDENT'S OFFICE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 23 & 26 September 2008

Urgent chamber application

Mr Mlotshwa, for the applicant
Advocate Uriri, for the 1st, 2nd and 3rd respondents
Ms Chimbaru, for the 5th respondent

CHATUKUTA J: This application is a sequel to the urgent application in case No. HC 5075/2008 in which the 1st and 2nd respondents were granted an order restoring to them access to the farm and ejecting the applicant from the farm. The background to that case is that the applicant was issued with an offer letter by the 5th respondent permitting him to occupy the farm. He moved onto the farm. The 1st and 2nd respondents filed the application in Case No HC 5075/08 alleging that the applicant was interfering with their occupation of the farm and therefore seeking an order for the ejectment of the applicant.

The order was duly granted on 25 August 2008. It is apparent from the papers filed in the present application that at the time that the applicant was granted the offer letter, the 5th respondent had not yet acquired the farm and therefore could not offer it to the applicant.

On 5 September 2008, the applicant filed an appeal against the provisional order citing several grounds for the appeal. The applicant did not seek leave to appeal as he had been advised by his legal practitioners of record that the interim relief granted was final and definitive in effect and therefore appealable without leave of the court. The applicant was also prompted to appeal by the fact on 29 September 2008, the 5th respondent acquired the farm and issued the applicant with another offer letter on 2 September 2008. The notice of appeal was served on the respondents.

Following the granting of the provisional order, the applicant moved off the farm in compliance with that order. It appears from his founding affidavit that he moved back onto the farm. However, it is not clear when he did so. On 10 September 2008, the 1st and 2nd respondents issued out a writ of eviction and the applicant was subsequently removed from the farm.

The applicant now seeks an order interdicting the respondents from ejecting him from the farm pending the determination of the appeal against the interim relief granted in case no HC. 5075/08.

The respondents raised a point *in limine*, that the notice of appeal was invalid for two reasons. The first reason was that the order in case No. HC 5075/08 was not appealable because it was granted by consent. It was submitted that the applicant was present on the day of hearing. His counsel, Mr. Bera indicated to the court that the applicant was consenting to the interim relief sought but would however oppose the final relief sought on the return day. *Advocate Uriri*, for the 1st, 2nd and 3rd respondents contended that the consent order as granted by the respondent did not fall within the purview of Rule 54 of the High Court Rules. He submitted that Rule 54 was intended for a situation where the parties consented to an order at a time when the court was not sitting. He further submitted that the situation was different where the parties, through their legal practitioners of choice opted before the court to consent to judgment. In this

regard, I was referred to the case of *Washaya v Washaya* 1989 (2) ZLR 195. *Ms Chimbaru* associated herself with the submissions made by *Advocate Uriri*.

The applicant contended that the consent order did not conform with Rule 54 in that there was no consent paper signed by the applicant and the respondents to indicate their consent personally or through their legal practitioners. The applicant referred me to the following cases: *Chivero & ors v Mudzimunyoro* 1994 (2) 371, *Washaya v Washaya* 1989 (2) 195 and *Masulani v Masulani* 2003 (1) 491 (HH 68/03)

A perusal of the record of proceedings as per the notes of the hearing by KUDYA J clearly indicates that the order was granted by consent. It appears from the record that the applicant was in attendance when the consent was made. There is no indication in the record that the applicant voiced its lack of consent during the hearing. In fact the matter which was supposed to be heard in the morning was stood down to 3.15pm to enable Mr. Bera, the applicant's then legal practitioner, to consult with the applicant. It therefore appears to me that the provisional order was indeed granted by consent.

Having said so, does the fact that the parties never signed any document indicating their consent to judgment render the consent order a nullity. In other words was the failure to comply with Rule 54 fatal. *Mr. Mlotshwa* conceded that consent to judgment can be either in terms of Rule 54 or under common law. In the absence of evidence to the contrary, it appears to me that the consent to judgment in case no HC 5075/08 was consent under common law. The cases referred to by *Mr. Mlotshwa* are in fact supportive of the proposition that consent to judgment can be in terms of common law. In *Margaret Masulani v Fanuel Masulani* HH 68/03, MAKARAU J (as then was) observed as follows at p 3-4:

> "It is common cause that the consent judgment in the application before me was not granted in terms of the rules. The parties appeared before a judge in chambers and indicated the terms of the consent order to the judge orally. No formal document was signed and filed by the parties, embodying the consent order. Technically, the consent order in the application before me was not granted in terms of the rules. It was granted at common law. (*See Washaya and Washaya 1989 (2) ZLR 195(H) at p 199F).*
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> ……
> It does appear to me that to distinguish between a consent order granted in terms of the rules from one granted at common law is indeed to make a distinction without a

> difference. In both cases, the judge or court will only proceed to grant a consent judgment at the behest of the parties or their legal practitioners. The behest may be in writing and signed by the parties or their legal practitioners, or may be made orally during argument or during a trial. In both instances, the judge or court will be relying on the submissions of the parties or their legal practitioners that a settlement has been reached in the matter and a consent order may be granted. In this regard, it may be worth considering amending rule 56 so that it applies to all consent judgments, simply to put it beyond doubt that in both instances, the court may set aside a judgment given by consent on good and sufficient cause." (see also *Southend Cargo Airlines (Pvt) Limited & ors v Zimbabwe Development Bank* HH 123/04)

Although based on facts distinguishable from the present, this case advances the above proposition. The distinction does not diminish the submissions made on behalf of the respondents but in fact enhances them. In the *Masulani* case, the parties had not filed a formal document indicating the terms consented to. The terms were indicated orally to the court. In case No. HC 5075/08, the 1st and 2nd respondents had filed a draft order, which the present applicant had considered. All that the court did not do was to endorse in the order that the parties had consented to the terms contained in draft.

In *Washaya*'s case, GREENLAND J (as he then was) stated as follows:

> "There having been no consent to judgment in terms of the Rules, was there consent at common law? Put differently, did Mr. Mugabe have his client's authority to so consent? In my view, such consent is recognizable & would bind the applicant. (Cites a plethora of South African cases in support of this proposition.) (at 99F-G)
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> ……
> It seems to me that where the court is satisfied that a legal practitioner has the authority of his client to consent to judgment, the client will be bound by such consent and the court will visit on the client a heavy onus before rescinding the judgment." (at 200G)

In the present application, the applicant has shied away from stating that Mr. Bera did not have instructions to consent. He simply stated that he did not consent to the judgment. The bare denial of consent to judgment does not assist the applicant, particularly in the face of the recordings made by KUDYA J during the hearing of case No. HC 5075/08. I therefore do not have a basis on the papers before me to hold that Mr. Bera did not have full instructions from the applicant to consent to the interim relief.

It is not in issue that a judgment by consent is not appealable. The cases the parties referred me to, and in particular the *Chivero*'s case, are supportive of this proposition. The rationale for that proposition is spelt in *Chivero*'s case where GUBBAY CJ (as he then was) stated at 373C-D, that in a judgment by consent there can be no finding of facts proved. In order for a notice of appeal to be valid, it must specify the finding of fact or rulings of law appealed against and this is not possible where the judgment was given by consent.

On that basis, I find that there is no valid appeal filed in the Supreme Court against the judgment in case no HC 5075/08. The present application is premised on appeal. In the absence of a valid appeal, there cannot be a valid urgent chamber application. As stated in See *Macfoy v United Africa Co. Ltd [1961*] 3 AU ER 1169 (PC) at 11721, by Lord Denning:-

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. **And every proceeding, which is founded, on it is so bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.**"(own emphasis)

The parties made submissions on the second ground why the respondents contended that there is no valid appeal before the Supreme Court. Although I have determined this matter on the basis of the first ground, I am of the view that it is necessary to remark on the second ground alluded to by the respondents. The respondents contended that the provisional order granted in HC 5075/08 is interlocutory and therefore not appealable except with the leave of the court. The applicant did not seek leave to appeal. Therefore the notice of appeal is invalid. On the other hand, the applicant contends that the interim relief sought, and in particular paragraph 9 of the interim relief is final and definitive in effect. Therefore it was not necessary, in terms of section 43 of the High Court Act [*Chapter 7:06*] to seek leave.

I am persuaded by the submissions by *Advocate Uriri*. The interim relief granted is pending the determination of the final order sought. It appears to me that paragraph 9 is subject to (1) the issuance of an eviction order following the initiation of criminal

proceedings against the 1st and 2nd respondents for contravening the Gazetted Land (Consequential Provisions) Act, 2006 and (2) the granting of an order by this court validating the offer letter the applicant held at the time or any subsequent offer letters authorizing him to take occupation of the farm. I therefore do not believe that the interim relief is final and definitive in effect as contended by the applicant. Paragraph 9 should be read together with paragraph 2 of the final order sought. In paragraph 2, the 1st and 2nd respondents seek to have the offer letter issued to the applicant and any other offer letters to be issued to be declared invalid except where they are issued with the approval of the Court. It is my view that it at that stage where the right of occupation of the farm by the applicant will be determined. The applicant would therefore have been required to seek leave to appeal. He has not done so. I am therefore of the view that the notice of appeal is invalid. I have already stated above the status of proceedings premised on an invalid notice of appeal. They are equally invalid.

In the result, the application is dismissed with costs.

Messrs Antonio, Mlotshwa & Co, applicant's legal practitioners
Coghlan, Welsh & Guest, 1st, 2nd and 3rd respondents' legal practitioners
Civil Division, Attorney General's Office, 5th respondent's legal practitioners