

ECONET WIRELESS (PRIVATE) LIMITED  
And  
REGGIE FRANCIS SARUCHERA  
(In his capacity as Curator of Renaissance Merchant  
Bank Limited)

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 26 and 27 July and 21 September 2011

### **Urgent Chamber Application**

*H Nkomo*, for the applicant  
*A Mugandiwa*, for the respondent  
*A B Chinake, T Tandi* on a watching brief for  
Renaissance Holdings (Private) Limited

MAVANGIRA J: On 29 June 2011 in HC 5213/11 I issued a provisional order in favour of Econet Wireless (Pvt) Ltd as the applicant, against Renaissance Financial Holdings Limited as the first respondent and Reggie Francis Saruchera (in his capacity as the Curator of Renaissance Merchant Bank Limited) as the second respondent. The terms of that order read:

#### “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. In the event of the respondents failing to discharge all of their obligations towards the applicant, including the payment of all capital amounts due and owing to the applicant together with all interest accrued, by 30 October 2011, the first respondent's shareholding in Africa First Renaissance Corporation Limited, be transferred to the applicant.
2. The respondents pay costs of this application at an attorney and client scale the one paying the other to be absolved.

#### INTERIM RELIEF GRANTED

1. The second respondent be and is hereby directed to forthwith deposit with the Registrar or Master of the High Court, Harare, Share Certificates of the first respondent in Africa First Renaissance Corporation Limited.

2. The first respondent be and is hereby interdicted from transferring, disposing of or encumbering in any other way, their shareholding in Africa First Renaissance Corporation Limited, pending the finalisation of this application”.

My reasons for granting the provisional order were laid out in my judgment which was availed to the parties on 15 July 2011. On 8 July 2011 an appeal was noted in the Supreme Court by Reggie Francis Saruchera as the appellant with Econet Wireless (Private) Limited being cited as the respondent. During the hearing of the instant matter it was indicated by Mr *Mugandiwa* that the said notice of appeal had since been withdrawn and a new notice of appeal which reflected the appellant as Reggie Francis Saruchera (in his capacity as curator of Renaissance Merchant Bank) had been filed on 20 July 2011.

On 21 July 2011 the instant application was filed. The applicant seeks herein a provisional order in the following terms:

#### “TERMS OF THE INTERIM RELIEF SOUGHT

It is hereby ordered that:

1. The appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent granted by Honourable Justice MAVANGIRA in HC 5213/11.
2. The respondent be and is hereby directed to forthwith, deposit with the Registrar of the High Court, Harare, the Share Certificates in respect of shares held by Renaissance Financial Holdings or its nominees in Africa First Renaissance Corporation Limited, in total amounting to 30% of the issued share capital of Africa First Renaissance Corporation Limited to be kept by the Registrar pending the discharge in full of Renaissance Financial Holdings Limited’s obligations to the applicant.
3. The noting of an appeal in this case shall not suspend the operation of this particular order.
4. That the respondent be and is hereby ordered to pay costs at an attorney and client scale including costs of two (2) counsels where two (two) counsels are employed.

#### TERMS OF THE FINAL ORDER SOUGHT

It is ordered that:

1. In the event of the respondent failing to discharge all of its obligations towards the applicant, including the payment of all capital amounts due and owing to the applicant together with all interest accrued, by 30 October 2011, the Registrar complies with the operational order confirmed in proceedings under HC 5213/11”.

The instant matter was heard on 27 July 2011. At the onset of proceedings Mr *Mugandiwa* raised a number of preliminary issues which he listed as “jurisdiction, urgency, procedure, service on interested parties and whether or not this court is *functus officio* in respect of part of the relief sought”. With regard to the preliminary point on jurisdiction the respondent’s contention is that the application before this court is not one for leave to execute pending appeal but for a declaratur. In the event, it was submitted, the court is thus being asked to exercise jurisdiction in terms of s 14 of the High Court Act, [Cap 7:06] and not its inherent jurisdiction as it would in an application for leave to execute pending appeal. An application for leave to execute pending appeal, it was contended, involves the enforcement of the court’s decisions and the applicable principles differ with those applicable when a declaratur is being sought. It was contended that the court is being asked to grant the declaratur in para 1 of the interim relief sought on the basis that the appeal was defective and therefore a nullity as no leave of this court had been sought and granted for the respondent to appeal against its decision. Furthermore, that as the validity or otherwise of the appeal is a matter for the Supreme Court to deal with, this court ought to decline jurisdiction for that reason.

In response Mr *Nkomo* submitted that as this court still has to either confirm or discharge the provisional order, it follows that it has jurisdiction to hear this matter. In any event, the relief that the applicant seeks herein, he submitted, is interlocutory in nature as it is for the respondent to deposit share certificates with the Registrar. He also submitted that the appeal is in any event a nullity and this court cannot be prevented from hearing this matter.

It was also submitted by Mr *Nkomo* that it is only in the first paragraph of the interim relief sought that a declaratur is sought and that should the court be persuaded by Mr *Mugandiwa*’s submissions on this aspect, it is only this paragraph which should be affected by his submission.

Regarding urgency, Mr *Mugandiwa* submitted that for more than three weeks after 29 June 2011 when the provisional order was granted, the applicant took no action, only to file this application on 21 July 2011. He also submitted that the certificate of urgency does not explain why these proceedings were not instituted immediately after the noting of the appeal on 8 July 2011. He urged the court to find that the matter is not urgent.

In response, Mr *Nkomo* submitted that from 8 July 2011 when the appeal was noted to 21 July 2011 when this application was filed, there were nine working days only. In any

event, he submitted, the assumption had been made that the respondent had made a genuine mistake by noting an appeal without first seeking the leave of this court, hence their letter to the respondent's legal practitioners pointing this out. The respondent's legal practitioner's response was served at his offices on 13 July 2011 while he was away. On his return on 18 July 2011 he realised that his interpretation of the provisional order and that of the respondents legal practitioners differed. He thus immediately took steps leading to the filing of this application on 21 July 2011. He urged the court to find that there was no inordinate delay and the short delay that there was to talk of had been adequately explained.

On the preliminary issue that he referred to as "procedure", Mr *Mugandiwa* submitted that declaratory relief, which is provided for in terms of s 14 of the High Court Act, is relief that cannot be sought by way of chamber application. He submitted that r 226(1) distinguishes between a court application which is made in writing to the court and notice is given to all interested parties and a chamber application which is made in writing to a judge. He submitted that the applicant had adopted the wrong procedure by seeking declaratory relief by way of chamber application. He further submitted that as declaratory relief is final in nature, it cannot be sought by way of a provisional order.

Mr *Nkomo*'s response was that there is no law that bars a party from seeking relief of this nature on an urgent basis. He submitted that s 14 of the High Court Act is silent on the aspect. He also submitted that the submission made in relation to r 225(1) is merely a question of semantics.

Regarding the issue of service on interested parties Mr *Mugandiwa* submitted that the applicant has not cited nor served Renaissance Financial Holdings Limited (RFHL), with the application. He submitted that RFHL which was a party in HC 5213/11 has also noted an appeal in the Supreme Court against the High Court's decision, and that consequently any order that this court may make in this instant matter would be rendered a *brutum fulmen* by its non-joinder, as the appeal by RFHL also has the effect of suspending the High Court's decision in HC 5213/11 even in relation to other parties including the respondent herein.

In response Mr *Nkomo* submitted that the only interested party in so far as the order being sought by the applicant is concerned, is the respondent herein. It is the respondent, he submitted, that holds the share certificates that the applicant seeks to be deposited with the Registrar of this court. RFHL does not have or hold the said shares.

The fifth and final preliminary issue raised by Mr *Mugandiwa* was that this court is *functus officio* in so far as para 2 of the interim relief sought is concerned. Mr *Nkomo*

immediately interjected and submitted that the paragraph as it then stood ought to be amended to read exactly as reads para 1 of the interim relief granted in HC 5213/11. However, even with the concession or amendment made, Mr *Mugandiwa* submitted, the court is being asked to make an order which it has already made in HC 5213/11 and in that regard, it is therefore *functus officio*. Mr *Mugandiwa* further submitted that the present application is essentially the issue that this court will be dealing with on the return day in HC 5213/11. It is thus an issue that is pending in HC 5213/11 and it will be dealt with in proceedings for the discharge or confirmation of the provisional order of 29 June 2011 in HC 5213/11. He submitted that the matter has thus been improperly raised in these proceedings.

Mr *Nkomo*'s response was that this court cannot be, and is not *functus officio* as the provisional order in HC 5213/11 is still pending before it for either confirmation or discharge.

Mr *Mugandiwa* submitted that the instant application seeks as the main relief, a declaratur and that the relief sought in the paragraphs subsequent to para 1 of the interim relief sought is consequential thereto. Mr *Nkomo* on the other hand submitted that the application is in effect one for leave to execute pending appeal.

Paragraph 1 of the interim relief sought reads:

“IT IS HEREBY ORDERED THAT:

1. The appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent ...”

In para 3 of the applicant's founding affidavit the following is stated:

“3. The applicant has approached this honourable court on an urgent basis seeking among other things the following relief:

- 3.1 A declarator that the appeal noted by the respondent under SC 153/11 shall not suspend the operation of the order as against the respondent ....”

Paragraph 3.1 is repeated in the applicant's answering affidavit.

It is clear from the papers filed by the applicant that the basis for it seeking the relief in para 1 of the interim relief is its contention that the respondent's notice of appeal is defective and therefore a nullity by reason of the respondent not having first sought and obtained this court's leave to appeal. It contends that the provisional order in HC 5213/11 is interlocutory in nature and thus the respondent has no automatic right of appeal.

Paragraph 2 of the interim relief granted in the provisional order in HC 5213/11 is an interdict. In terms of s 43(2)(d)(ii) of the High Court Act, [Cap 7:06] the respondent did not need to seek and obtain leave to appeal against the order. The court was also referred to the case of *Pissas v Pissas* 2008 (1) ZLR 261 (H) where at 266 C – D GOWORA J stated:

“So assuming I am incorrect in finding that access is an incidence of custody and that on that basis the applicant would not have required leave to file the appeal, part of the order from the judgment appealed against was an interdict. On that basis, the appeal would qualify under the exceptions referred to in s 43 (2)(d) of the Act. I find, therefore, that there was no need for leave to appeal and that therefore there is an appeal pending before the Supreme Court”.

It would appear to me that *in casu*, as in *Pissas v Pissas* (*supra*) an appeal is pending before the Supreme Court.

The learned judge in *Pissas v Pissas* further stated at 266 E-G:

“... The noting of an appeal has the effect of suspending the order or judgment which is the subject matter of the appeal. The authority for that principle is the *dictum* by CORBETT JA (as he then was) in *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (S). What the learned judge of appeal had to say at 544 H-545 A was to the following effect:

‘Whatever the true position may have been in the Dutch courts, and more particularly the court of Holland (as to which see *Ruby’s Cash Store (Pty) Ltd v Estate Marks & Anor* 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave, the party in whose favour the judgment was given must make special application’. (emphasis added).

The emphasis added to the above dicta has been necessitated by the nature of the relief being sought by the applicant *in casu*. The applicant, in its own words, seeks a declaratur from this court in so far as para 1 of the interim relief is concerned. The wording of the said paragraph confirms this statement. In the next breath the submission was made at the hearing that effectively this is an application for leave to execute pending appeal. It would appear to me that an application for leave to execute pending appeal is such a special application as not to need to be interpreted or deduced or inferred from the papers. The

papers must clearly and specifically indicate the exact nature of the application before the court. The applicant herein has, in my view, failed in this regard.

In any event, if it is in effect an application for leave to execute pending appeal, the applicant does not appear to have taken the care to address the principles or factors which the court must apply in determining such an application. In *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (HC), ADAM J stated at 154 G to 155 E:

“Under our common law the execution of the order granted by SANDURA JP was automatically suspended upon the noting of the appeal: *Reid & Anor v Godart & Anor* 1938 AD 511 at 513. This meant that, pending the appeal, the order could not be carried out except with the leave of this court and in order to obtain such leave special application had to be made by the applicant: *Geffen v Strand Motors(Pvt) Ltd* 1962 R & N 259 (SR) at 260; 1962 (3) SA 62 (SR).

It is clear that principles which must be applied to this court in determining the matter are those stated by CORBETT JA in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545:

‘In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

- (1) The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
- (3) The prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and
- (4) Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.’

I should indicate that this court has applied the foregoing principles in *Dabengwa & Anor v Minister of Home Affairs* 1982 (1) ZLR 223 at 225 (HC), *Jeremy Prince (Pvt) Ltd v Owen & Anor* HH 14-86; *Van t’ Hoff v Van t’ Hoff & Ors* (2) 1988 (1) ZLR 335.”

What the applicant has sought to do is to persuade this court, that because the respondent did not obtain the leave of this court, its appeal to the Supreme Court is defective and thus provides the justification for the granting of the relief in para 1 of the interim relief.

This contention has already been dealt with above and I decline to find in the applicant's favour on it.

Regarding para 2 of the interim relief sought herein, it is clear that the relief, sought (as amended during the hearing) has already been granted by this court in HC 5213/11. Paragraph 3 is consequential upon the granting of para 2. No justification was furnished for seeking an order of costs in the interim relief. Regarding the final order sought, it is also clear that this is in effect the final relief sought in the provisional order granted in HC 5213/11. However, in view of my main finding regarding the non-requirement for leave to appeal, these further issues may not need to be discussed in this judgment. It also appears to me that there is no need, to discuss the preliminary issues further than this. It appears to me therefore for the above reasons, that there is no justification established by the applicant for the granting of the provisional order sought. The application cannot succeed. Costs will follow the cause.

In the result it is ordered as follows:

The application is dismissed with costs.

*Mtewa & Nyambirai*, applicant's legal practitioners  
*Wintertons*, respondent's legal practitioners