

THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA
versus
DIOCESAN TRUSTEES FOR THE DIOCESSE OF HARARE
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 14, 15, & 23 September 2011.

Urgent Chamber Application

J Bhamu, for the applicant
T. M Kanengoni, for the first respondent.

UCHENA J: The applicant filed an urgent chamber application seeking an order of this court, staying the execution of an order granted by HLATSWAYO J on 24 July 2009, in HC 4327/08.

The respondent opposed the application and raised preliminary issues on the jurisdiction of this court to hear and determine an application for, a stay of an execution which was authorised by the Supreme Court, urgency and the authority of the deponent of the applicant's founding affidavit. I will first consider the issue of jurisdiction as the consideration of the other issues depends on whether or not I have jurisdiction entitling me to hear this application.

The history of the parties' disputes leading to this application is as follows. The parties appeared before HLATSWAYO J who granted the order which the applicant wants to be stayed. The applicant appealed to the Supreme Court. The appeal suspended the execution of that order. The appeal SC 180/09 was dismissed for failure to comply with r 46 (5) of the Supreme Court rules. The applicant applied for its reinstatement which was granted by the Chief Justice in SC 19/11.

In granting the reinstatement the Chief Justice in paragraphs two and three of his order, ordered that;

1. ----

2. It is ordered that the appeal against the first court order of HLATSWAYO J of 24 July 2009 be and is hereby reinstated.
3. The noting of the appeal should not suspend the operation of the order referred to in para 2 above.

The order in paragraph three was given after the Chief Justice had in his judgment SC 19/11, at pages 9 to 10 of the cyclostyled judgment said;

“Condonation for failure to comply with the Rules of this Court is an indulgence granted by a Judge of this Court upon the exercise of his judicial discretion. In the exercise of that judicial discretion the Judge may impose appropriate conditions. *In casu* having considered that there has been numerous applications and counter-applications between these parties, there is need to curtail these applications. The multiplicity of these applications is simply adding to the confusion and hampering expeditious finalization of the dispute between the parties. Taking these factors into account, it is desirable that the judgment (judgment in HH 166/09), in respect of which I have reinstated the Notice of Appeal, remain extant until set aside by the Court on appeal. For the avoidance of doubt, the judgment will not be suspended by the noting of an appeal against it.”

Mr *Bhamu* for the applicant bases the applicant’s application on an application it has made to the Constitutional Court against the Chief Justice’s order, and another urgent application it has filed in the Supreme Court seeking the urgent set down of the constitutional application. The parties advised this court that they have since appeared before the Chief Justice and agreed to postpone sine die the constitutional application and urgent application in the Supreme Court in preference of the urgent set down of the reinstated appeal. This is in tandem with the reason for which execution pending appeal was granted. The multiplicity of applications is clearly being frowned upon. Mr *Bhamu* submitted that the order to be stayed is an order of this court and the warrant of execution was issued by this court, therefore this court has jurisdiction to control its internal processes. That would be correct, when this court is acting in the absence of a contrary order from a higher court, on the execution of this court’s order. In this case the question of jurisdiction arises because the Supreme Court on reinstating the applicant’s appeal used its appellate discretion exercised when granting the indulgence the applicant was seeking, to order that the noting of the appeal was not to suspend the execution of the judgment whose appeal it was reinstating. It gave reasons for its order and specifically said this was to curtail the multiplicity of applications between these parties. My task is to

determine whether this court can entertain an application to circumvent the Supreme Court's clear order that execution should proceed in spite of the reinstatement of the applicant's appeal.

Mr *Bhamu* further argued that the Supreme Court's order merely reversed the onus from the responded to the applicant on whether or not the order of HLATSWAYO J can be executed pending appeal. Ordinarily the onus to apply for execution pending appeal would have been on the responded. The applicant's counsel therefore argued that the Chief justice's order has merely shifted the onus to apply for stay of execution to the applicant. That is a simplistic approach to the issue before the court. The issue before the court involves a definitive order backed by clear reasons for the order to execute pending appeal. It was to stop the multiplicity of applications, not to merely shift the onus from one party to the other.

Mr *Kanengoni* submitted that the Supreme Court has clearly pronounced its decision on the execution of the order pending appeal, and this court can not alter what the Supreme Court has ordered. It simply has no jurisdiction. Mr *Kanengoni*'s submission seems to have merit, as. Courts, fall within a recognised hierarchy, based on their superiority over each other. The Supreme Court being the highest court of the land, is superior to the High Court, and its orders are binding on this court, and can not be countered by it. The applicant's attempt to circumvent the Supreme Court's order through this Court is a novel one which Mr *Bhamu* for the applicant and Mr *Kanengoni* for the first respondent conceded has no local precedent. The applicant's counsel, and respondent's counsel, where thus given time to enable them to research and make written supplementary submissions on case law from other jurisdictions. They were put on terms as to when they were to file their respective supplementary submissions.

In his written supplementary submissions Mr *Bhamu* in para 5 said;

“While there is a plethora of case law, both in our jurisdiction and beyond, on the particular issue of a court's jurisdiction to determine an application for stay of execution, no case has been found which fits on all fours with the set of facts as in the present matter. However the other authorities found are of great value in so far as they relate to the generic principles governing stay of execution, which can be equally applied to solve the legal problem in this case.”

The lack of precedent in our jurisdiction and elsewhere confirms the novelty of the issue before me. It seems to confirm that I am being asked to act against the current of judicial precedents, and the normal order of the operation of the hierarchy of courts. The generic principle on this court's jurisdiction to control its own process had been exhausted and needs no further consideration. I will however consider the applicant's submissions on the case of *Commercial Farmer's Union vs Mhuriro & Others* 2000 (2) ZLR 405 SC, and section 79B of the Constitution, which applicant's counsel argues may justify the assumption of jurisdiction by this court in spite of the Supreme Court's order.

The *Commercial Farmers Union vs Mhuriro* case

In the *Commercial Farmers Union vs Mhuriro* case (*supra*) a situation similar to that in the present case arose but in slightly different circumstances. The Commercial farmer's Union had in an earlier case succeeded in obtaining the Supreme Court's order by consent for the eviction of people who had settled at its member's farms. Mhuriro and other settlers applied to the High Court for the stay of that order, pending their making a constitutional application to set aside the Supreme Court's order before the Constitutional Court.. The High Court granted the order sought. The Commercial Farmers Union applied to the Supreme Court for the setting aside of the High Court's order on the ground that the High Court had no jurisdiction to interfere with the Supreme Court's order. The Supreme Court in granting the Commercial Farmers Union's application per GUBBAY CJ with the concurrence of four other judges of the Supreme Court at page 408 C to E said;

“While s 7 of the Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it. It would be to sanction, as occurred in this matter, an interference by a single judge of the High Court with an order concurred in by five judges of the Supreme Court. The proposition only needs to be stated to reveal its inherent flaw.

The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court.”

In his supplementary submissions Mr *Bhamu* sought to distinguish the Commercial Farmers Union case (*supra*) from this case on the following grounds;

1. That the order of the Chief Justice was not issued pursuant to the Supreme Court exercising original jurisdiction granted by s 24 (1) as read with s 24 (4) of the Constitution.
2. The order was issued in chambers with only the Chief Justice presiding.
3. The order which was to be stayed in the *Commercial Farmers Union vs Mhuriro* case had not originated from the High Court, and
4. Applicant is not asking for stay of an order made with the consent of the parties.

Mr *Kanengoni* for the first respondent was also not able to find authorities from other jurisdictions supporting the proposition that this court has jurisdiction to hear an application seeking to stay execution of this Court’s order which the Supreme Court has ordered in spite of its having reinstated the appeal. He commented on the Commercial Farmers Union case in paragraph 6 of his supplementary submissions as follows;

“The only case cited by the applicant that somewhat resembles the present matter is that of *Commercial Farmers Union vs Mhuriro & Ors* 2000 (2) ZLR 405 SC. The applicant has however sought to distance itself from the authority of that case on the contention that it is distinguishable from the present matter. There are factual differences between the present matter and the Commercial Farmer’s Union case (*supra*), but it is noteworthy that one of the premises upon which the Supreme Court found that the High Court could not exercise jurisdiction upon orders of the Supreme was the hierarchy and judicial authority of the courts in Zimbabwe.”

He however did not deal separately with the four grounds of distinction advanced by the applicant’s counsel.

A reading of the Commercial Farmer’s Union case (*supra*) reveals that the Supreme Court based its finding on its original and appellate jurisdiction. It clearly said;

“this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the Constitution. For

such would constitute a direct interference with the authority of a superior court by one subordinate to it.”

In this case the Supreme Court exercised its appellate jurisdiction in ordering execution pending appeal. The fact that the Supreme Court did not exercise original jurisdiction when it ordered execution pending appeal does not therefore, confer jurisdiction on this court to interfere with the Supreme Court’s order.

The fact that the order was granted by the Chief Justice in chambers sitting as a single judge of the Supreme Court does not open his order to interference by a court subordinate to his. The reference to five judges in the *Commercial Farmers Union* case (*supra*) was merely for emphasis. An order of the Supreme Court whether by one judge or the full bench is an order of the Supreme Court, and is binding on all courts subordinate to it and can not be interfered with by them. In the quotation of GUBBAY CJ’s judgment in the *Commercial Farmers Union* case (*supra*) referred to earlier the Supreme Court clearly spelt out the position of its orders when it said;

“The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court.”

Nothing therefore turns on the order having been issued by the Chief Justice sitting in Chambers.

The fact that the order which was to be stayed in the *Commercial Farmers Union vs Mhuriro* case had not originated from the High Court does not take the applicant’s case any further because as already said once the Supreme Court issues an order either in the exercise of its appellate or original jurisdiction, it can only be interfered with by itself and by no other court. Therefore nothing turns on the applicant’s third distinction of the *Commercial Farmers Union* case (*supra*) from this case.

The fact that applicant is not asking for stay of an order made with the consent of the parties is of no relevance. The issue is on the jurisdiction of this court to interfere with the order of the Supreme Court irrespective of how it was made. As already said, it remains an order of the Supreme Court and may only be varied, set aside or, in any way interfered with by the Supreme Court.”

The precedent created in the *Commercial Farmers Union vs Mhuriro* case (*supra*) therefore applies with equal force in this case. Its application in this case has not been ousted by the applicant's counsel's attempt to distinguish it from this case.

Section 79B of the Constitution.

The applicant's counsel also sought to rely on s 79B of the Constitution to prove that this court has jurisdiction in spite of the prior order of the Supreme Court ordering the execution of HLATSWAYO J's order which the applicant seeks to stay through this application. He in para 7 of his supplementary submissions said;

“The above authority is self explanatory , this court is not subject to the direction or control of any person, including the Chief Justice, except to the extent that may be provided for under a written law. It is up to 1st respondent to present a written law which would place the exercise of this court's jurisdiction under the control or direction of the Chief Justice. This is also in view of the fact that the Chief Justice is himself a member of the High Court, which is designated as a superior court of record with inherent jurisdiction in terms of Sections 79, 79A, and 80 of the Constitution.

Mr *Kanengoni* in paragraphs 15 to 17 of his supplementary submissions commented on Mr *Bhamu*'s reliance on s 79B of the Constitution as follows;

15 With respect to the contention that s 79B of the constitution allows this honourable court to grant the relief sought herein, one must advert his attention to the first words of that section i.e;

“In the exercise of his judicial authority”

16 The section is therefore, premised upon the boundaries of the judicial officer's judicial authority. As highlighted herein above, the hierarchy of the courts and consequent judicial authority in Zimbabwe does not vest this honourable court with jurisdiction to grant the relief sought herein. It follows from this that this honourable court cannot, by virtue of section 79B extend the boundaries of its judicial authority as to allow it to entertain this matter. Section 79B merely enshrines independence of the judiciary within the ambit of its judicial authority. It does not sanction the ad hoc extension of such judicial authority.

17 Section 79B can therefore, not be a basis upon which this honourable court can exercise jurisdiction in this matter.”

I agree with Mr Kanengoni's submission that s 79B of the Constitution does not extend this court's authority, nor enable it to interfere with the decision of the Supreme Court which authorised execution pending appeal, but merely provides for the independence of the judiciary.

Section 79B provides as follows;

“In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.”

My understanding of s 79B of the Constitution is that judicial officers are to act independently in the exercise of their judicial authority. They shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary.

This does not in my view entitle a judicial officer to vary, set aside or interfere with an order made by a court superior to his, or fail to observe judicial precedents based on the hierarchy of the courts. Precedents are based on the hierarchy of the courts and simply require a subordinate court to defer to the decisions of the court superior to it. Section 80 of the Constitution provides that;

“(1) There shall be a Supreme Court which shall be a superior court of record and the final court of appeal for Zimbabwe---”

Section 80 places the authority of judges of this court under that of judges of the Supreme Court., which is the highest court of the land. It thus, as permitted, by s 79B, places judges of this court under the direction or control of the decisions of judges of the Supreme Court, who are members of the judiciary.

Sections 79, and 81 of the Constitution also place the High Court below the Supreme Court. In this case the Supreme Court, while exercising its appellate jurisdiction which carries finality on any issue ordered that execution can be carried out pending the reinstated appeal. Therefore s 79B does not apply to the circumstances of this case. It does not excuse a judicial officer from being bound by a prior decision of a court

of superior jurisdiction. A judicial officer can therefore not interfere with, vary or set aside, a prior decision of a court of higher jurisdiction.

In this case the Chief Justice made the order in issue, before an application was made to this court. His court is superior to mine. His prior determination that the order of HLATSWAYO J should not be suspended by the reinstated appeal, can therefore, not be said to be a directive to this court. It is a determination of an application that was before him long before this application was made. It is however an order of the Supreme Court which this court can not vary or interfere with.

The fact that the Chief Justice is in terms of s 81 (2) (a) of the Constitution, a member of and can preside in the High Court as a judge of the High Court does not have any relevance in this case, because he did not exercise his high court jurisdiction when he made the order which led to this application. He made that order in the exercise of his appellate jurisdiction as a judge of the Supreme Court as provided in s 80 (2) (a) of the Constitution.

What would be a direction or control prohibited by s 79B is an administrative order he can give in terms of s 79A of the Constitution as head of the judiciary if it affects a judicial officer's exercise of his judicial authority. In view of the above there is no merit in Mr *Bhamu*'s submissions based on s 79B of the Constitution. I am therefore satisfied that I have no jurisdiction to interfere with the order granted by the Chief Justice.

In the result the applicant's application is dismissed with costs.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners
Chikumbirike & Associates, first respondent's legal practitioners