JG CONSTRUCTION
versus
GRAEME CHADWICK
and
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 21 and 26 March 2012

Urgent Chamber Application

J Samukange, for the applicant
A Rutanhira, for the 1st respondent

BERE J: In this urgent chamber application the applicant seeks an interim relief to interdict the first respondent from continuing with execution pending the finalization of the instant case.

The brief background to this matter can be summarised as follows:

After hearing arguments in case number HH 102-12 my brother MATHONSI J in a thoroughly reasoned judgment granted summary judgment in favour of the now first respondent in this matter on 14 March 2012. Following upon the pronouncement of the judgment in question and dissatisfied with the judgment in issue, the applicant filed its notice of appeal in the Supreme Court of Zimbabwe on 6 February 2012. The filing of the appeal was done within the time stipulated by the rules governing the appeal process. The notice of appeal was subsequently served on the Registrar of the High Court.

Despite the noting of the appeal in the Supreme Court the first respondent proceeded with execution prompting the applicant to lodge the instant application.

In proceeding with execution, the first respondent has raised a number of issues whose cumulative effect the first respondent argues renders the filed notice of appeal fatally defective to the extent that the appeal itself must be rendered a nullity.

The first argument raised by the first respondent as a preliminary point was that by failing to serve the notice of appeal on the first respondent, the applicant had not complied with the peremptory requirements of r 29 (2) of the Supreme Court Rules which requires that

once filed or noted the notice must be served *inter alia* on the respondent. The applicant has not taken a definitive position with regards to the service or non-service of the notice of appeal. For purposes of this judgment, and aided by the submissions made by both counsels I have no hesitation in accepting it as a fact that the notice of appeal filed in the Supreme Court on 6 February 2012 was indeed not served on the first respondent. I also accept it as properly established by the first respondent that the failure to serve the notice of appeal amounted to non-compliance with the peremptory requirements of r 29 (2) of the Supreme Court rules, 1964.

Apart from the alleged non-compliance with the Supreme Court rules, the first respondent has attacked what he perceives to be the inadequacies of the Certificate of Urgency and the founding affidavit by the applicant which the respondent argued should be regarded as not having been properly placed before the court.

Counsel for the respondent has also gone further to deal with what he perceives to be zero prospects of success on the appeal itself. The first respondent is of the firm view that the appeal itself is frivolous and vexatious as it has been noted with *mala fide* intentions.

The applicant argued that once it noted its appeal the first respondent was automatically barred from proceeding with execution in the absence of a successful application to execute pending the outcome of the appeal. It was also argued that it was not the function of the High Court to deal with the alleged shortcomings or defects in the appeal itself but that that was the province of the Supreme Court itself.

In advancing its position on the alleged non-compliance with the mandatory provisions of the Supreme Court rules, the first respondent referred me to the case of *Mohamed Nazir Ors*[1] where their Lordship and two of their Ladyships dealt with a similar provision like our r 29 (2) of the Supreme Court rules. In that case the court dealt with the interpretation of their Order 2 Rules 4(1) and 2 which is worded in virtually the same way as our r 29 (2) of the Supreme Court Rules. The Chancellor in that case stated:

> "There is no doubt in my mind that the word "shall" in Order 2 Rules 4 (1) and (2) is mandatory in relation to the service of a notice of appeal. The appellant therefore was obliged to serve this notice of appeal upon all parties affected by the appeal within seven days after filing the original notice. Not having done so the appellant is accordingly in breach of r 4 (2). There is no specific rule for applying to extend this period of time unlike a breach of Order 2 Rule 3 (3) which empowers a court in

[1] Mohamed Nazir and Nazdek Housing Group and The Attorney General of the Republic of Guyana Civil Appeal No. 30 of 2002

> exceptional circumstances and for good and substantial reasons to extend the time for filing a notice of appeal."

Further reference by the first respondent's counsel was also made to the case of *Charl De Kock* and *Wilton Tobacco Estate Company*[2] per BHUNU J where the learned Judge was of the firm view that the appeal whose validity he had to deal with was an irregular and invalid one and could not suspend execution until such time the defect in that appeal had been remedied. It is significant that in that case the appeal had been filed out of time and no condonation had been sought to regularise that defect.

In *casu* the appeal was filed in time and served on the Registrar of the High Court. The only notable omission was failure to serve that notice on the respondent.

It is doubtful in my mind if it should be the function of this court to try and deal with the merits or demerits of an appeal which for all intents and purposes is not before it but intended for the Supreme Court.

I say so because in terms of our Supreme Court Rules as currently framed the Supreme Court has a wide discretion in dealing with the matter placed before it. For good and sufficient cause shown the Supreme Court may decide to condone non-compliance with its own Rules. See Section 4 of Supreme Court Rules. In this regard I find support in the headnote of the case of *Hubert Davies Employees Trust* (*Pvt*) *Ltd Ors* v *Croco Holdings* (*Pvt*) *Ltd*[3] where it is stated:

> "A notice of appeal which does not comply with the requirements of r 29 of the Supreme Court Rules 1964 is fatally defective. Unless the Court is prepared to grant an application for an extension of time within which to comply with the relevant rule and allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs." (my emphasis)

It occurs to me that the process of granting indulgence falls within the province of the Supreme Court and not the High Court which at this stage is *functus officio*. The High Court cannot sit as a court and start speculating on what the Supreme Court may or may not do without taking the risk of abusing that Court in the appeal process itself.

In this regard I am more inclined to follow the reasoning by the learned Judge GOWORA J(as she then was) when she stated as follows:

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[2] Charl De Kock and Wilton Tobacco and Estate Company v Mike Madiro and Freddy Gowero HH 30-04, per BHUNU J

[3] Hubert Davies Employees Trust (Pvt) Ltd & Ors v Croco Holdings (Pvt) Ltd 2009 (2) ZLR 53 (S)

> "It is also pertinent to note that the appeal is before the Supreme Court and it is my view the Supreme Court which should state whether or not the appeal is null and void for want of compliance with the rules. In the absence of such a declaration it is not open to this court to find that the appeal is null and void."[4]

In conclusion, I prefer the school of thought that in appeal matters we follow the basics, that is, once an appeal is noted or filed it suspends execution. Our rules as they stand provide a remedy in the event of the other party desiring to proceed with execution despite the noting of an appeal.

Consequently, the interim relief sought is granted as prayed for.

Venturas & Samukange Legal Practitioners, applicant's legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners

[4] Mydale International Marketing (Pvt) Ltd v Dr Rob Kelly and Hammer and Tongues (Pvt) Ltd HH 4-2010 p 4 of the cyclostyled judgment