RIOZIM LIMITED
versus
MARANATHA FERROCHROME (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE,

Interlocutory application – leave to appeal

Date of written judgment: 2 October 2020

Adv T. Zhuwarara, for the applicant
Adv F. Girach, for the respondent

MAFUSIRE J

[1] This is an interlocutory application. The applicant seeks leave to appeal my judgment delivered under the reference no HH 482-20. My judgment under the reference no HH482-20 was on an application for absolution from the instance made by the applicant at the close of the respondent's case in a civil trial under the case reference no HC 6774/18. In the civil trial under the case reference no HC 6774/84 the respondent herein is the plaintiff, and the applicant herein the defendant. Therein the respondent claims payment of certain sums of money as compensation or as unjust enrichment. The details are unimportant. In any case, they appear fully in judgment no HH482-20 aforesaid. In that judgment, I refused the applicant's application for absolution from the instance. Now in this application the applicant seeks leave to appeal to the Supreme Court against my refusal. Leave is necessary because HH 482-20 was an interlocutory judgment on an interlocutory matter. Section 43(2)(*d*) of the High Court Act, *Cap 7:06*, provides that such interlocutory judgments are not appealable unless with the leave of the judge.

[2] In judgment no HH 482-20 aforesaid I gave reasons why absolution from the instance at the close of the respondent's case was not available to the applicant. In brief, I said I was satisfied that the respondent's evidence had established such a *prima facie* case against the applicant as would warrant the applicant taking the witness' stand. In this application, the applicant says by that ruling I erred in a number of respects, hence the application for leave to appeal.

[3] The respondent opposes the application. Firstly, it raises two preliminary points to show that the application is fatally defective for want of compliance with the Rules of this court and should therefore not be entertained on the merits. The one defect raised is that the format used by the applicant to launch its application for leave to appeal is not one prescribed by the Rules, more particularly r 263. The respondent says, contrary to the peremptory direction in r 263, the applicant has not, on the face of the application itself,

- stated the reasons why the application for leave to appeal was not made in terms of r 262;
- listed the proposed grounds of appeal, and
- listed the grounds upon which leave to appeal should be granted.

[4] For support, the respondent relies on cases such as *Marick Trading (Private) Limited v Old Mutual Life Assurance Company of Zimbabwe (Private) Limited* HH 667-15[1] and *Zimbabwe Open University v Mazombwe & Anor* 2009 (1) ZLR 101(H). In both these cases, and several others, chamber applications were dismissed, or struck off the roll, for failure by the applicants to invoke the correct Form to accompany the applications.

[5] The respondent's second preliminary objection is that there was an inordinate delay in serving the application after it had been issued, contrary to another peremptory direction in r 264, as read with r 269. Rule 264 requires that a copy of the application for leave to appeal must be served on the respondent immediately after it has been filed. In this case, the application was filed on 7 August 2020. However, it was not until 12 August 2020 that it was

[1] A judgment by myself published in 2015 (2) ZLR 343 (H)

served on the respondent. The respondent argues that "*immediately*" means "*without delay*" or "*at once*". It submits that the application should have been served on it on the same day that it was issued.

[6] Rule 262 reads:

> "Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit."

[7] Rule 262 applies to appeals in criminal proceedings. But by virtue of r 269 its provisions, and those of the other rules on the point, also apply to civil proceedings where leave to appeal, as in the present case, is required. Rule 263 then goes on to say:

> "Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted."

[8] Therefore, where one intends to appeal a judgment in circumstances in which leave to appeal is required, one must make an oral application for that leave immediately after the judgment has been delivered. In the present case, that did not happen. The applicant explains in the founding affidavit by its legal practitioner why it did not happen. The affidavit says my judgment dismissing absolution from the instance was handed down in motion court. The presiding judge in motion court, in terms of a rule of practice, only read out the operative part of the judgment, not the whole judgment. The legal practitioner had to obtain the whole judgment only after motion court had ended. Even then, he had to study the judgment and obtain further instructions from the applicant on whether or not to appeal.

[9] With regards the first preliminary objection, I consider that the respondent has confused the requirements of r 241(1) with those of r 263. The respondent also seems to have misconstrued the *ratio decidendi* of cases such as *Marick Trading* and *Mazombwe* above. These cases interpreted r 241(1). The rule reads:

> "***241. Form of chamber applications***
> (1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

[10] This rule prescribes, in mandatory language, the format a chamber application should take. There are four peremptory directives. The first is that the chamber application must be entered in the chamber book. The second is that it must be accompanied by Form 29B duly completed. The third is that it must be supported by an affidavit, or affidavits, of facts. The fourth is that if the chamber application is one to be served on interested parties, then it must be accompanied by Form 29 (as opposed to 29B), with appropriate modifications.

[11] The one mistake the respondent is making in its first preliminary objection is the failure to appreciate that r 241(1) is the general rule governing chamber applications in general. But r 263 is the specific rule for a specific instance, namely leave to appeal. Rule 263, and the several others on the point, constitute a self-contained code on what a chamber application for leave to appeal should contain and how it should be dealt with. While r 241(1) directs, among other things, that a chamber application shall be accompanied by Form 29B, there is no similar direction in r 263. It is Form 29B, not r 241(1), that requires the reasons for the chamber application to be stated on the face of the application itself. In *Marick Trading* and *Mazombwe*, the applicants, for their chamber applications, used a format that was completely alien to the Rules. Their chamber applications were accompanied by no known Form: neither 29B nor 29. So, in the present case, for the respondent to require that the applicant ought to have stated the reason why the application for leave to appeal was not made in terms of r 262; the grounds of appeal; and the grounds of the leave, all on the face of the application itself, is to insist on something neither the Rules of court nor case law prescribes. That is not all.

[12] The fourth requirement for r 241(1) as listed above, is in relation to chamber applications that are to be served on interested parties. The present application was one to be

served on an interested party, the respondent. The rule says such an application is to be accompanied by Form 29, with appropriate modifications. Form 29 has no requirement for stating the reasons for the chamber application on the face of the application. In the present application, the reasons why the leave to appeal was not sought in terms of r 262 are fully explained in the founding affidavit. What constitutes an application are all the founding documents: the application itself, which is the court process commencing the proceedings; the founding affidavit and others filed in support, and the annexures tendered as the evidence of the averments in the affidavit, or affidavits. So, where an applicant in an application for leave to appeal under r 263, has stated in the supporting affidavit, or affidavits, the reasons for the non-compliance with r 262, as the applicant herein has done, I consider that he or she or it will have complied with the provisions of r 263. For these reasons, I dismiss the respondent's first preliminary objection.

[13] I also dismiss the respondent's second preliminary objection. The respondent is reading into r 264 words that are not there. The relevant portion of that rule reads:

"A copy of the application shall be served on the Attorney-General immediately after the application is filed with the registrar."

[14] The respondent would want the word "… *immediately* …" read to mean "… *on the same day of filing*". That cannot be right. Such a construction would run counter to the golden rule of statutory interpretation. There is no ambiguity in the rule as it stands. There is no confusion. Read together, r 263 and r 264 show that what must happen within the prescribed twelve days [of the handing down of judgment] is the filing of the written application with the registrar. Service of that application must be done immediately afterwards. "Immediately" is one of those abstract notions, like "reasonable", that defy precise definition. They are malleable concepts. They are pliable. They derive colour or meaning from the context in which they are used in any given circumstance. In the present case, to read into the rule the words "… *on the same day of filing* …" would be too prescriptive and injudicious. The circumstances of this case show that there was no delay in the service of the application for leave to appeal. It was filed on 7 August 2020. That was a Friday. The following two days, 8

and 9 August, were a weekend. The next two days, 10 and 11 August, were public holidays, namely the Heroes' and the Defence Forces' Days respectively. So, the next business day was 12 August. That was when the application was served. I am satisfied that there was no breach of the rule.

[15] On the merits, the applicant argues that it wants to appeal my absolution judgment because I misapplied the law. It says, in paraphrase, I have wrongly focused on the applicant's own case, wrongly placing an onus on it to prove the illegality of the agreement of sale in question, instead of focusing on the case of the respondent on which the onus lies to prove the legality of the agreement. The applicant argues that the illegality is self-evident and that it appears *ex facie* the document. It also argues that it having pleaded the defence of prescription, it was incumbent upon the respondent to lead evidence of the interruption of such prescription.

[16] With all due respect, this application forces us into a merry-go-round. It is like a dog chasing its tail. I am mindful of the need to avoid "*the human inclination to adhere to [a] decision* [already made]" (see *Health Professions Council v McGowan*1994 (2) ZLR 392 (S) at p 337C – D). But this is an application that, I am convinced, is devoid of merit. I find that the grounds of the application and the intended grounds of appeal do not go outside the precincts of my judgment. I mean, in my judgment, I ruled that the application for absolution from the instance cannot succeed because the plaintiff, the respondent herein, has made out such a *prima facie* case as to warrant the defendant, the applicant herein, taking the witness' stand.

[17] In the present application, the applicant practically goes no further than merely disputing that the respondent has established a *prima face* case. As for the reasons for my decision, I said the purported illegality of the agreement in question did not appear *ex facie* the document as to form the basis for a finding that the agreement was in *fraudem legis*. In the present application, the applicant argues that I must have found that the illegality appears *ex facie* the document merely by construing the words "… *a surveyed stand yet to be*

allocated a number …" to mean that there was no subdivision permit. In my judgment, I effectively ruled that even if the agreement is hit by the *ex turpi causa* doctrine so as to be unenforceable, that is not the only doctrine applicable on the point because there is also the *in pari delictum* rule that can be invoked and relaxed to do "… *simple justice between man and man* …" (see *Dube v Khumalo* 1982 (2) ZLR 195). But in the present application, the applicant goes no further than maintaining that the agreement was illegal and therefore unenforceable.

[18] On prescription, I ruled that the onus is on the respondent to prove this special defence. Prescription is a technical but substantive objection that is pleaded as a special defence. It requires evidence to be proved. In the present application, the applicant argues that I erred by not finding that the respondent's evidence did not establish that the claim *has not* prescribed, or that the running of prescription *has not* been interrupted! In other words, I erred because I did not call upon the respondent to prove a negative! This is preposterous. He who alleges must prove. At any rate, the special plea of prescription cannot be the basis of absolution from the instance. Prescription is an absolute bar to a cause of action. If the matter is prescribed, the plaintiff is barred for all times. He or she or it cannot come back to court on the same cause again. Yet with absolution from the instance, the court is telling the plaintiff that he or she or it has not provided sufficient evidence for the case to proceed to the defence case. The plaintiff can always come back to court on the same cause but with better evidence. So, if the applicant is convinced the respondent's claim is prescribed, it must lead evidence to that effect and ask for judgment in its favour, not absolution.

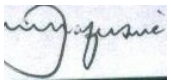
[19] Leave to appeal can be granted if there are reasonable prospects of success on appeal: see *Pichanick NO v Paterson* 1993 (2) ZLR 163 (H). There are none in this matter. At the risk of being repetitive, the words "… *a surveyed stand yet to be allocated a number* …" cannot always mean, or even connote, the absence of such a subdivision permit as is contemplated by s 39(1) of the Regional, Town and Country Planning Act, *Cap 29:12*. This section does not even say anything about stand numbers. It merely prohibits the subdivision or consolidation of a property by any person without the prescribed permit. If the applicant's

defence is that the respondent, in spite of its denial, both in its pleadings and its evidence at trial, was aware that there was no subdivision permit and that for that reason, or some other, it was complicit in the defiance of the law, then it is incumbent upon the applicant itself to prove these facts. It bears the onus. More so when the respondent's evidence so far also shows unequivocally that both parties treated the agreement of sale in question as valid for all purposes right up to the time of the legal proceedings.

[20] In determining an application for leave to appeal, the court also considers the balance of convenience as between an immediate appeal on the interlocutory matter and the immediate prosecution of the action: see *Pichanick*, *supra*. I consider that it is much faster and comparatively much cheaper for the trial to complete and for the loser, if it be so inclined, to take the matter on appeal, at the end of the trial, than to allow an appeal now when there are chances of it failing and the matter coming back to this court for the resumption of the trial. If the appeal is allowed but fails in the Supreme Court, what will stop any of the parties from seeking another appeal should another interlocutory matter arise again? It is not desirable that a dispute should be determined in peace meal fashion or in instalments. The delays would be unwarranted. Without in any way apportioning blame, I note that the main action commenced in July 2018. More than two years later, the trial is now only half way through. Allowing an appeal on a mere interlocutory matter will cost, in my estimation, another year or two, should the appeal fail. It is more convenient to carry on with the trial.

[21] In the premises, the application for leave to appeal is hereby dismissed with costs. The trial of this matter shall resume and proceed on Monday, 19 October 2020, at 10:00 hours, or so soon thereafter as the matter may be heard.

2 October 2020



Kantor & Immerman, plaintiff's legal practitioners
Coghlan, Welsh & Guest, defendant's legal practitioners