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Judgment No S.C. 73\2002

Civil Appeal No 259\00

TRUST MERCHANT BANK LIMITED v MAKO PROPERTIES CONSTRUCTION (PRIVATE) LIMITED t/a MSUNA SAFARIS AND TRAVEL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE MARCH 14 & SEPTEMBER 17, 2002

Ms Siveregi, for the appellant

No appearance for the respondent

MALABA JA: On 29 March 2000 Mako Properties Construction (Private) Limited (hereinafter referred to as "Mako Properties") made an application to the High Court in case HC-1487-00 for an order that two applications it had made separately against Trust Merchant Bank Limited (Trust Merchant Bank) in case HC-3327-99 and Zimbabwe Development Corporation (ZDC) be consolidated and heard together as one application. Trust Merchant Bank and ZDC opposed the application but the court *a quo* nonetheless granted the order of consolidation on 8 September 2000.

On 15 September 2000 Trust Merchank Bank purported to note an appeal against the order of the court *a quo*. The respondent's legal practitioners

drew the attention of Trust Merchant Bank's lawyers to the fact that the order made by the court *a quo* was an interlocutory order against which no appeal could lie without leave of the judge who made it.

Section 43(2)(d) of the High Court Act [Chapter 7:06] provides that:-

> "No appeal shall lie … from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court …"

It is clear from its form and effect that the order made by the learned judge is an interlocutory order within the meaning of section 43(2)(d) of the Act. In *Steytler N.O. v Fitzgerald* 1911 AD 295 at 304 LORD de VILLIERS CJ said that the test whether or not an order was interlocutory was:-

> "Whether on the particular point in respect of which the order is made the final word has been spoken in the suit, or whether in the ordinary course of the same suit, the final word has still to be spoken."

In the same case INNES J (as he then was) said at 313:-

> "It is not desirable to attempt an exhaustive definition. A number of tests to ascertain whether a decree is definitive are given in the books. It is sufficient for the purposes of this case to say that when an order incidentally given during the progress of litigation has a direct effect upon the trial issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final, though in form it may be interlocutory."

So there is a fairly settled rule for testing the appealability of the order made by the court *a quo*. See also: *Globe And Pheonix Gold Mining Co Ltd v Rhodesian Corporation Ltd* 1932 AD 146; *Pretoria Garrison Institutes v Danish Variety Products (Pvt) Ltd* 1948 (1) SA 839; *Salter Rex & Co v Ghosh* [1971] 2 All

ER 865; *Technistudy Ltd v Kerrand* [1976] 3 All ER 632; *South Cape Corp v Engineering Management Services* 1977 (3) SA 534.

The order made in this case did not have the effect of terminating the suit between the parties or disposing of any portion of it. It allowed the suit to continue leaving the main issues raised therein to be determined at a later stage of the proceedings. As such the final word on the main issues raised by the applications was not spoken when the order was made and the relief sought by Mako Properties against Trust Merchant Bank was not in any way anticipated or precluded in whole or part by the granting of the order.

As the order made by the High Court on 8 September 2000 is an interlocutory order in the sense in which the expression is used in section 43(2)(b) of the Act, no appeal lay as of right against it without leave of the judge who made the order. Leave to appeal against the order was not sought from the learned judge by Trust Merchant Bank.

The case is therefore struck off the roll and the respondent is entitled to its costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

Dube Manikai & Hwacha, appellant's legal practitioners