REPORTABLE (14)

Judgment No. SC 21/17
Civil Application No. 252/12

(1) THE PRESIDENT OF ZIMBABWE ROBERT GABRIEL MUGABE (in his official capacity)
(2) DAVID KARIMANZIRA (3) CAIN MATHEMA (4) MARTIN DINHA (5) AENEAS CHIGWEDERE (6) FABER CHIDARIKIRE (7) JAISON MAX KOKERAI MACHAYA (8) CHRISTOPHER MUSHOWE (9) ANGELINE MASUKU (10) TOKOZILE MATHUTHU (11) TITUS MALULEKE (12) THE MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT

v

MORGAN RICHARD TSVANGIRAI (in his official capacity as the Prime Minister of the Republic of Zimbabwe and in his personal capacity)

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 19, 2012
JUDGMENT RELEASED ON 26 FEBRUARY 2017

T Hussein, for the applicants

T Mpofu, for the respondent

Before: CHIDYAUSIKU CJ, In Chambers, in terms of Rules 30(c) and 31 of the Supreme Court Rules as read with section 43(2)(d) of the High Court Act [*Chapter 7:06*]

This is a Chamber application for leave to appeal in terms of r 30(c) of the Supreme Court Rules as read with s 43(2)(d) of the High Court Act [*Chapter 7:06*] (hereinafter referred to as "the Act"). At the conclusion of submissions by counsel, Mr *Mpofu*, for the respondent, conceded that the applicants should be granted leave to

appeal as they have prospects of success in the intended appeal against the judgment of the court *a quo*.

In my view, the concession was properly made because the applicants do have prospects of success on appeal. Accordingly, the application for leave to appeal was granted by consent.

Because this case involves an important point of procedure, I indicated then that I would give reasons for concluding that the concession was properly made and that the applicants have prospects of success on appeal.

The following are the reasons.

The facts of this case, which are common cause, are that the first applicant is the President of Zimbabwe (hereunder referred to as "the President"). The respondent is Mr Morgan Tsvangirai, the Prime Minister of Zimbabwe (hereunder referred to as "the Prime Minister"). The Prime Minister, in a court application launched in the High Court, challenged the validity of the President's appointment of the second to the eleventh respondents as Governors of the various Provinces in Zimbabwe ("the Governors"). The Prime Minister did not seek the leave of the court to sue the President, as is required by r 18 of the High Court Rules 1971 (RGN 1047/1971). Rule 18 of the High Court Rules provides as follows:

> "No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose."

The purpose of r 18 is to protect not only the President but also Judges of the High Court from frivolous and vexatious litigation. The President raised as a point *in limine* the Prime Minister's failure to secure the leave of the court to sue the President, as is required by r 18 of the High Court Rules. The court *a quo* dismissed the point *in limine*. The President, dissatisfied with this determination, applied for leave to appeal against that determination. The application for leave to appeal was dismissed. The President now seeks the leave of a Judge of this Court for leave to appeal in terms of r 43(2) (d) as read with r 30(c) of the Rules of the Supreme Court 1964. As I have already stated, Mr *Mpofu,* for the Prime Minister, conceded that such leave be granted on the basis that the President has prospects of success on appeal.

In dismissing the President's application for leave to appeal, the learned JUDGE PRESIDENT stated at p 1-3 of the cyclostyled judgment:

> "The applicants seek leave to appeal against the judgment of this court granted under case HH 273-12 (HH 8542/10). In that case the applicants raised a point *in limine* in which they sought to rely on the provisions of r 18 of the Rules of Court to preclude the respondent (then the applicant) from pursuing an application against the first applicant on the ground that prior leave of this court had not been obtained. I dismissed that preliminary issue and granted leave for the applicants to file their opposing papers so that the matter could be determined on the merits.
>
> The applicants wish to appeal against that decision. They have filed the present papers seeking leave to so appeal.
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> The respondent opposes the grant of leave to appeal on three grounds. Firstly, he questions the authority of the deponent to the founding affidavit, Mr D Mangota, the Secretary for Justice and Legal Affairs, to so depose to the founding affidavit. Secondly, he argued that the order sought to be appealed is a procedural ruling which is not appealable even with the leave of the court. On the merits of the case the respondent argues that the Supreme Court has already pronounced itself on the matter in the case of *Zimbabwe Lawyers for Human Rights and Anor v President of the Republic of Zimbabwe* 2000 (1)

ZLR 274 (S) in which it held that the President can be sued in his official capacity without leave of the court. …

Should leave to appeal be granted as requested by the applicants? The applicants' main argument is that the matter is of immense public interest and should be clarified by the Supreme Court. However, the Supreme Court has already adjudicated the legal status of r 18 of the High Court Rules. It did so in the *Zimbabwe Lawyers for Human Rights* case *supra*. I have no doubt in my mind that the President or any other member of the Executive can be sued in his official capacity without leave of this court.

In any event, it is not in dispute that there are many other cases, past and pending, in which the President has been sued in his official capacity. No similar objections have been raised by the parties or the courts, a fact which tends to confirm that the applicants' position is unprecedented and unsupportable at law."

Mr *Hussein*, for the President, submitted that the applicants have prospects of success on appeal because the judgment of the court *a quo* erred in the following three respects –

(1) The court *a quo* erred when it dismissed the point *in limine* which had been raised, that the respondent was not properly before the court because he had omitted to comply with r 18 of the High Court Rules.

(2) The court *a quo* erred in not accepting that in terms of r 18 of the High Court Rules and the common law leave to sue the President should first be sought and granted before instituting legal proceedings against him in the High Court.

(3) The court *a quo* erred in not finding that non-compliance with r 18 of the High Court Rules rendered the application before it a nullity and therefore could not be condoned.

The learned JUDGE PRESIDENT relied on the case of *Zimbabwe Lawyers for Human Rights* judgment 2000 (1) ZLR 274 (S) in concluding that leave of the court was not a necessary requirement for suing the President. In this regard the learned JUDGE PRESIDENT erred. The *Zimbabwe Lawyers for Human Rights* judgment *supra* is authority for the proposition that leave of the court is not required when the President is sued in the Supreme Court in terms of s 24 of the Constitution of Zimbabwe (hereinafter referred to as "the Constitution"). It certainly is not authority for the proposition that the leave of the court is not required when the President is sued in the High Court. In my view, there is need to protect the President and Judges of the High Court from vexatious litigation in the High Court, hence the need for r 18. Different considerations apply to litigation in the Supreme Court for a number of reasons.

Firstly, s 24 of the Constitution provides for the only instance where the Supreme Court has original jurisdiction. All other matters commence in the subordinate courts. Section 24 of the Constitution protects not only the President but everyone from vexatious and frivolous litigation, rendering r 18 of the High Court Rules superfluous. In the *Zimbabwe Lawyers for Human Rights* case *supra* the headnote in the relevant part reads:

> "*Held*, that although s 30 of the Constitution provides that the person holding the office of President has immunity from civil and criminal proceedings whilst he is in office, legal proceedings can still be brought against the office of the President in his official capacity.
>
> *Held*, further, that whereas r 18 of the High Court Rules requires that a litigant must obtain the leave of the court to issue legal process against the President, there is no similar provision in the Supreme Court Rules requiring … a litigant to obtain leave from the Supreme Court before legal process is issued against the President.

Held, further, there is a need to preserve the dignity and status of the office of the President and the office of the President must not be harassed with frivolous and vexatious legal proceedings. Where an alternative means of obtaining redress is available to the claimant it should be pursued.

Held, further, that it is not necessary for a person to obtain leave from the Supreme Court to proceed against the President where he is alleging that there has been an infringement of the Declaration of Rights provisions in the Constitution. Section 24(1) of the Constitution allows anyone who is complaining of an infringement of his fundamental rights to come directly to the Supreme Court. This right is subject to various restrictions and limitations. For instance, the Court can protect the President against harassment by vexatious litigation by using its power to determine an application without hearing it where it is of the opinion that the allegation is merely frivolous and vexatious. …" (My emphasis)

In short, it was concluded in the *Zimbabwe Lawyers for Human Rights* judgment *supra* that –

(1) The Supreme Court does not have a rule similar to r 18 of the High Court Rules which requires that leave be applied for before the President is sued;

(2) Rule 58 of the Supreme Court Rules cannot be invoked to import the provisions of r 18 of the High Court Rules to Supreme Court proceedings;

(3) It is not necessary to obtain leave to sue the President when a violation of the Declaration of Rights is alleged and the litigant is proceeding in terms of s 24 of the Constitution; and

(4) The Supreme Court, using the provisions of s 24 of the Constitution, can protect the President from frivolous and vexatious claims, which is

the reason behind the provision of r 18 of the High Court Rules that leave be obtained first.

Before concluding, I need to deal with the suggestion that r 18 of the High Court Rules is *ultra vires* s 4 of the State Liabilities Act [*Chapter 8:14*], which provides as follows:

> "Whenever the President or a Vice-President or any Minister, Deputy Minister or public official is cited in any action or other proceedings in his official capacity he shall be cited by his official title and not by name."

In my view, s 4 of the State Liabilities Act confers on a litigant a right to bring proceedings against the President in his official capacity provided that the President is cited by his official title and not by name.

I do not see any inconsistency between this section and r 18 of the High Court Rules. If anything, I see a complementation between the two provisions. Whenever a litigant wishes to sue the President he has to comply not only with s 4 of the State Liabilities Act but also with r 18 of the High Court Rules. Section 4 of the State Liabilities Act and r 18 of the High Court Rules provide that for the President to be sued two requirements are necessary - (1) he has to be sued in his official capacity; and (2) if the suit is in the High Court leave of the court has to be obtained first.

Section 4 of the State Liabilities Act merely sets out the manner in which the President or other public officials are to be cited if the intention is to sue them in their official capacities. Section 4 of the State Liabilities Act does not pronounce on the issue of leave to sue. It merely demonstrates the possibility that proceedings may be brought and provides for the manner of citation. There is nothing in the *Zimbabwe Lawyers for Human Rights* judgment *supra* to suggest that r 18 of the High Court

Rules is now superfluous and is no longer required or necessary in regard to proceedings in the High Court. The purpose of r 18 of the High Court Rules is to protect the President and Judges of the High Court from frivolous and vexatious litigation. I see no reason why the rule should be considered superfluous as it serves a legitimate purpose.

I also wish to make the following observation. Rule 18 of the High Court Rules does not bar anyone from suing the President. It merely requires a prospective litigant to obtain the leave of the High Court before the litigant can sue the President or a Judge of the High Court. As I have already stated, the purpose of r 18 of the High Court Rules is to protect the President and Judges of the High Court from frivolous or vexatious litigation.

I am aware that r 4C of the High Court Rules authorises the High Court to depart from its own Rules. Thus, if the Prime Minister had admitted his failure to comply with r 18 and had sought condonation for such failure to comply with r 18 of the High Court Rules, the court *a quo* could, if it was so persuaded, have granted condonation for such failure to comply with r 18 of the High Court Rules. It, however, is a misdirection for the court to condone a departure from the High Court Rules in the absence of an application for such condonation. *In casu*, the Prime Minister contended that he did not need such condonation because r 18 of the High Court Rules was superfluous or invalid. Where a litigant adopts such a stance condonation cannot be granted by the court *mero motu*.

In brief, I am satisfied that the appeal against the determination of the court *a quo* on the point *in limine* has prospects of success in that the court *a quo*

misdirected itself - (a) on the interpretation of r 18 of the High Court Rules; (b) in making inconsistent findings that r 18 of the High Court Rules no longer applies and then condoning non-compliance with it. It would not be necessary to condone non-compliance if the rule had no legal force; and (c) in condoning a departure from the High Court Rules when no application for condonation had been made.

It is for these reasons that I was satisfied that the concession by counsel for the respondent was well-founded and granted the relief sought by the applicant.

Ranchod & Hussein, applicants' legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners