

REPORTABLE (31)

(1) NETONE CELLULAR (PRIVATE) LIMITED (2) REWARD
KANGAI

v

(1) ECONET WIRELESS (PRIVATE) LIMITED (2)
ZIMBABWE REVENUE AUTHORITY

**SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & PATEL JA
HARARE, 7 FEBRUARY & MAY 26, 2017**

T. Mpfu, for the appellants
T. Nyambirai, for the first respondent
A. Chinake, for the second respondent

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Case No. SC 695/15

PATEL JA: This is an appeal against the judgment of the Fiscal Appeal Court dismissing an application by the appellants to set aside a subpoena *duces tecum* issued by the registrar of that court on 9 February 2015. The first appellant is Netone Cellular (Pvt) Ltd (Netone) and the second appellant is its Managing Director (Reward Kangai), while the first respondent is Econet Wireless (Pvt) Ltd (Econet) and the second respondent is the Zimbabwe Revenue Authority (ZIMRA).

The subpoena in question was issued by the registrar pursuant to an order of the court in terms of s 6 of the Fiscal Appeal Court Act [*Chapter 23:05*]. It directed Kangai

to testify and produce documents relating to customs duty on certain base stations imported by Netone, from October 1998 to November 2013. This testimony was required by Econet for the purpose of its appeal in the main case (FA 01/14) in which it had appealed against the decision of ZIMRA imposing retrospective duty of US\$15.8 million and a 300 per cent penalty of US\$47.6 million on the importation of base station components from 2009 to 2013. Econet had originally intended to call a former clearing agent who had cleared components on behalf of Netone to show that it was being discriminated against in the imposition of duty by ZIMRA. Netone objected to this clearing agent being called to testify, while ZIMRA claimed taxpayer privilege and that it was not the custodian of the documents required.

In their application to set aside the subpoena, the appellants challenged its issuance on the grounds that it was invasive and also incompetent in its scope and reach. Judgment No. SC 36/2017
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In a very detailed judgment, the court *a quo* ruled that the requested documents were relevant to the determination of the real issues between Econet and ZIMRA in the main appeal. It reasoned that the appellants were competent and compellable witnesses and that their right to privacy was countervailed by Econet's right of access to information and right to a fair trial. Moreover, although the collation of the documents was arduous it was not an impossible task since the documents required had been particularised. They were necessary to establish whether or not ZIMRA was treating Econet in a discriminatory fashion. Consequently, the court dismissed the application and ordered each party to bear its own costs.

The grounds of appeal herein may be summarised as follows: that the evidence in question could be obtained from ZIMRA itself; that the subpoena issued was unduly oppressive and invasive of Netone's right to privacy as well as being vexatious in its specific identification of Kangai; and that the subpoena was too generalised and a trawling retaliatory measure in abuse of court process and in breach of the right to protection of the law. The appellants pray that the judgment of the court *a quo* be overturned and substituted so as to grant their application to set aside the impugned subpoena with costs.

At the hearing of the appeal and pursuant to his heads of argument, counsel for the first respondent, Mr. *Nyambirai*, raised the point *in limine* that the subpoena issued by the court *a quo* was purely administrative and interlocutory in nature. He cited several English cases in support of this position and submitted that since no leave to appeal had been obtained, as required by s 11 of the Fiscal Appeal Court Act [*Chapter 23:05*] as read with s 43(2)(d) of the High Court Act [*Chapter 7:06*], the present appeal was improperly before the Court. It should therefore be struck off the roll with costs.

Adv. *Mpofu*, counsel for the appellants, countered that the judgment of the court *a quo* was final and definitive in nature and, as such, did not require leave to appeal. He submitted that the dispute as to compliance with the contested subpoena was *res judicata* and incapable of being revisited by that court. The present dispute between the appellants and the first respondent was divorced from the main matter between the first and second respondents. The preliminary point should therefore be dismissed with costs.

After having adjourned to consider these submissions, the Court took the view that the preliminary issue raised was of sufficient procedural importance to merit further and fuller written argument focusing on relevant statute law and decided cases on leave to appeal in England and South Africa. Counsel for the appellants and the first respondent were accordingly directed to file supplementary heads of argument on the subject within the following four weeks. Judgment on the preliminary point taken by the first respondent was reserved.

Applicable Statute Law

As intimated at the outset, s 6 of the Fiscal Appeal Court Act regulates the summoning and privileges of witnesses and the production of documents:

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- “(1) The Court shall have power to summon witnesses, to call for the production of and grant inspection of books and documents and to examine witnesses on oath.
- (2) A subpoena for the attendance of witnesses or the production of books or documents shall be signed by the registrar of the Court and served in the same manner as if it were a subpoena for the attendance of a witness at a civil trial in a magistrates’ court.
- (3) Any person subpoenaed to give evidence or to produce any book or document or giving evidence before the Court shall be entitled to the same privileges and immunities as if he were subpoenaed to attend or were giving evidence at a trial in the High Court.”

Section 11 of the Act provides for appeals from decisions of the Fiscal Appeal Court to the Supreme Court as follows:

“An appeal from any decision of the Court shall lie to the Supreme Court in accordance with the law and rules of court for the time being governing appeals from the High Court to the Supreme Court in civil cases.”

Section 43 of the High Court Act governs appeals from that court to this Court in civil cases. With specific reference to interlocutory matters, subs (2)(d) of s 43 stipulates that:

“(2) No appeal shall lie—
(a);
(b);
(c);
(d) 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, except in the following cases—
(i) where the liberty of the subject or the custody of minors is concerned;
(ii) where an interdict is granted or refused;
(iii) in the case of an order on a special case stated under any law relating to arbitration.”

Also relevant for present purposes is s 6 of the Supreme Court Act, Chapter 10 of the Judgments Act, 1958. Judgment No. SC 36/2017 Case No. SC 695/15

7:13]:

“In any matter relating to records, practice and procedure for which no special provision is contained in this Act or in rules of court, the matter shall be dealt with by the Supreme Court or a judge thereof as nearly as may be in conformity with the law and practice for the time being observed in England by the Court of Appeal.”

In South Africa, the position on appellate procedure at the turn of the last century was regulated by s 22 of the Transvaal Proclamation No. 14 of 1902 which gave a right of appeal to the Supreme Court of Transvaal from any final order granted or judgment pronounced by a judge sitting in chambers. This was repeated in r 4(a) of the Rules of the Supreme Court, but r 91 provided that there could be no appeal, even with leave, from

any interlocutory order granted by a judge in chambers. See *Pretoria Racing Club v Van Pietersen* 1907 TS 687 at 694.

The above position was later modified in the South African Supreme Court Act No. 59 of 1959. In terms of s 20(1)(a) as read with s 20(2)(b), in relation to appeals from a single judge of any division to the full court of that division, an interlocutory order was not subject to appeal save with the leave of the court which gave the order. As regards any final order made by a single judge, no leave to appeal was required. In contrast, by virtue of s 21(2)(a) of the Act, all appeals to the Appellate Division from any decision given by any divisional court required the leave of that court or, if such leave was refused, the leave of the Appellate Division. Therefore, it was not necessary to draw any distinction between interlocutory and final orders appealable to the Appellate Division insofar as leave to appeal was concerned.

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The advent of the Appeals Amendment Act No. 105 of 1982 effectively obliterated the distinction for all appeals, whether lodged with a divisional court or with the Appellate Division. Sections 7 and 8 of the 1982 Act substantially replaced ss 20 and 21 of the 1959 Act so as to render all appeals subject either to the leave of the court whose judgment or order is appealed against or to the leave of the appellate court. In effect, “all judgments and orders, whether final in effect or not, are now appealable with leave”. See *Priday t/a Pride Paving v Rubin* 1992 (4) SA 541 (C) at 544.

In England, the position that pertains in respect of leave to appeal is markedly different from that which obtains in South Africa. Before 1981, s 31(1)(i) of the Supreme

Court of Judicature (Consolidation) Act 1925 provided that no appeal would lie from any interlocutory order or judgment made or given by a judge without the leave of the judge or of the Court of Appeal. The 1925 Act, together with other enactments relating to the Supreme Court, was amended and consolidated by the Supreme Court Act 1981 [Chapter 54]. In terms of s18(1)(h) of that Act, no appeal lies to the Court of Appeal from any interlocutory order or judgment made or given by the High Court or any other court or tribunal, without the leave of the court or tribunal in question or of the Court of Appeal – except in specified cases. Two of the exceptions to the general rule are virtually identical to the exceptions enumerated in s 43(2)(d) of our High Court Act.

Relevant Case Authorities

In South Africa, as I have already noted, there was initially no right of appeal against interlocutory orders, that right being confined to appeals against final orders or judgments only. In the *Pretoria Racing Club* case (*supra*), Smith J observed, at 694, that it was not possible to lay down principles which will differentiate the one class from the other under every state of facts and that the court must decide in each case what the nature of a particular order is. At 694-695, the learned judge noted that the distinction between interlocutory and final orders as giving a right of appeal was recognised in both England and South Africa. However, at 696, he opined as follows:

“It must be borne in mind, in considering the view adopted by the English courts, that the distinction is of importance under the English rules with regard to the time within which an appeal should be brought, and not, as here, whether an appeal lies at all. By adopting the same construction here as has been placed on the words by the English courts, we should materially restrict the number of orders from which an appeal could be brought, and the result might be to create serious inconvenience.”

Relying on this *dictum*, Mr. Nyambirai argues that the South African emphasis on the finality or otherwise of an order was necessitated so as to avoid the incidence of irremediable loss and the injustice that could arise from a total denial of the right to appeal. The position in England is different because the right of appeal against interlocutory orders, albeit with leave, was never completely denied. Accordingly, he submits that since the wording of s 18(1)(h) of the English Supreme Court Act 1981 is the same as that of its predecessor as well as s 43(2) of our High Court Act, it is the English position that should obtain in this jurisdiction. In this regard, he places particular reliance on the decision of the Court of Appeal in *Senior v Holdsworth, Ex parte Independent Television News Ltd* [1976] 1 QB 23 (CA).

The facts of that case are as follows. The plaintiff in an action in the county court sued the police for damages for assault in the course of the dispersal of a three-day "pop" festival. Before the trial, he sought by way of a witness summons, issued by the registrar under the County Court Rules, the production and exhibition by ITN of all film and video, both transmitted to the public and untransmitted, taken by its camera crews of the dispersal. The summons was defective and invalid but, during the trial, the judge directed that a fresh summons be issued requiring ITN to produce all the film negative of the events at the festival. ITN, through its director, objected to produce the untransmitted film and asked for leave to appeal. The judge refused to alter the order and refused leave to appeal. He then concluded the trial in favour of the plaintiff without having seen the untransmitted film. On his direction after the trial, the registrar issued a summons under

the County Court Act requiring ITN to show cause why a fine should not be imposed for not obeying the order.

On an *ex parte* application by ITN asking that the order be set aside, the Court of Appeal treated the proceedings as an application for leave to appeal from the judge's order. The court granted leave to appeal and then allowed the appeal. It was held that the order to produce all film negative taken during the three days of the festival was so wide as to be oppressive and should therefore be set aside. The only point of dissent among the learned judges was whether or not the film was a "document" for the purposes of a subpoena *duces tecum* within the prescribed procedure for such a summons.

Lord Denning MR perceived that there were two points to be considered, to wit, the jurisdiction of the county court to order the production of the film and show it and, if the court could order it, what were the principles it should have applied. On the jurisdictional point, the learned judge held that both the High Court and the county court had inherent jurisdiction to order or decline and refuse the production of films and the necessary apparatus. He proceeded to opine, at 32H-33B, as follows:

"If the judge makes an order with which the witness is aggrieved, the witness will have an appeal to this court. Although he is not a party to the suit, he is a person who is aggrieved by the order: and he is entitled, by leave, to appeal against it. He must obtain leave either from the judge or from this court: but he cannot appeal without such leave: see section 31(1)(i) of the Supreme Court of Judicature (Consolidation) Act 1925. In my opinion leave is required from the county court judge or this court for appeals from interlocutory orders, even on a point of law."

Orr LJ postulated that the first question on appeal was whether any appeal lay in law against the judge's direction that a fresh summons *duces tecum* should issue. He answered the question, at 35G-H, as follows:

“[In] my judgment it is clear that the remedy of a person served with a witness summons or a summons *duces tecum* under Order 20, r. 8, of the County Court Rules, the issue of which, in my judgment, is obligatory on application duly made and is an administrative and not a judicial act, is to apply to set it aside and not by way of appeal; there being, if the court should refuse to set it aside, a right of appeal arising in the proceedings or matter constituted by the summons itself.”

Scarman LJ also addressed the nature of a summons *duces tecum* under the County Court Rules and observed as follows, at 39E-40A, 40F-G and 42H-43A:

“I think it is clear that the County Court Rule, upon its true construction, requires of the registrar an administrative, not a judicial act. The County Court Rule (Ord. 20, r. 8) says that the registrar shall issue the summons: it does not require of him an order made judicially, but lays on him a duty to be performed in the office upon production of certain specified documents. This is a classic form of administrative duty.”

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“In my view, therefore, the principle is the same in the county court and High Court. The subpoena or summons issues as of course without the need for any order of the court: but the witness or person served has the right to apply to set it aside.”

“The law, as it now stands, does not enable the court to refuse to issue a witness summons (or subpoena) for the production of documents upon due application. The remedy available to the person served is to move to set the summons aside.”

Mr. *Nyambirai*, as I have already stated, anchors the bulk of his argument *in limine* on what he perceives to be the gist of the above *dicta*. He contends that the judgment of the court *a quo* was purely interlocutory and therefore necessitated the leave of that court to appeal against it. Advocate *Mpofu* takes the view that the first respondent's reliance on *Senior's* case is entirely misplaced for the following reasons. Firstly, the question of the nature of the order on appeal was not argued in that case and

the remarks of Lord Denning on the need for leave to appeal are *obiter*. That issue was not one of the two issues placed before the court and does not form part of the *ratio* of the court's judgment. Moreover, both Orr and Scarman LJ simply conclude that the order in question is appealable and do not even suggest that there is need for leave to appeal. Secondly, the judgment does not correctly reflect our law in that it fails to consider that, insofar as the subpoenaed witness is concerned, the question of whether he has to give evidence is the only issue that arises between the witness and the party that has called him. Once that question is resolved, the dispute between those parties comes to an end. Instead of the *dicta* propounded in *Senior's* case, *Adv. Mpofu* commends to this Court the approach enunciated by our courts in *Jesse v Chioza* 1996 (1) ZLR 341 (SC) and in *Mwatsaka v ICL Zimbabwe* 1998 (1) ZLR 1 (HC).

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In *Mwatsaka's* case, the High Court in a civil case took the view that there were material disputes of fact which could best be resolved by hearing oral evidence and it made an order referring the factual disputes to trial. The applicant appealed against the order. The respondent argued that the order being appealed against was effectively an interlocutory order which the applicant was not entitled to appeal without first obtaining the leave of the court to do so. When the matter came before the Supreme Court the appeal was struck off the roll without argument being heard. The applicant then instituted a chamber application before the High Court for leave to appeal. The court, *per* Devittie J, dismissed the application and later furnished a fully reasoned judgment to address what the learned judge perceived to be an interesting question, *i.e.* "the utility of the distinction

between ‘rulings’ and ‘simple interlocutory orders’ in determining an application for leave to appeal”.

The decision in *Mwatsaka*’s case may be garnered from the headnote. It was held that a distinction is to be drawn between interlocutory orders having final effect, which orders are appealable without leave, and those which do not have final effect, in the sense that they do not irreparably preclude some of the relief which might be granted in the main action. The latter are referred to as simple or purely interlocutory orders. Such orders are further sub-divided into those that are appealable before the completion of the trial with leave of the court and those that are mere procedural rulings which are not appealable, even with leave of the court. The main reasons for disallowing appeals in respect of procedural rulings are that, if they were to be appealable, this would lead to a multitude of expensive and inconvenient subsidiary appeals; and that no hardship is caused to the aggrieved party by disallowing an appeal, because he can raise the issue of the erroneous ruling on appeal after completion of trial. It was further observed that precluding an appeal in respect of a simple interlocutory order that was a procedural ruling could lead to injustice, as in some cases to allow such an appeal might result in a more expeditious and less expensive determination of the dispute between the parties. A better approach would be to decide whether or not the balance of convenience and expense lies in favour of or against the granting of leave to appeal. The fact that the order can be classified as a ruling should be merely one factor to be taken into account in deciding this issue. In the event, it was held that the order in question was an

interlocutory order as it did not have final effect. It was a procedural ruling that was not appealable, even with leave.

Mr. *Nyambirai* criticises the reasoning of the court in *Mwatsaka's* case on the basis that some of its *dicta* are seemingly contradictory. He also argues that the views expressed in the judgment are *obiter* in that, in the application for leave before it, the court simply had to address the requirements for leave to appeal, without having to delve into the question as to the necessity of obtaining such leave. In any event, so he argues, the court relied upon case authorities which had interpreted outdated South African statutes that had been replaced. Advocate *Mpofu*, on the other hand, fully supports the reasoning in *Mwatsaka's* case as being in accord with the decision in the *Pretoria Racing Club* case (*supra*) and consistent with established principle, *viz.* that interlocutory orders that are final in nature or effect are appealable without leave.

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With respect to the scope and application of this principle, the decision of this court in *Jesse v Chioza* (*supra*) is of particular significance. In that case, the respondent, pursuant to an urgent chamber application in the High Court, obtained a provisional order against the appellant. The final order sought was to interdict the appellant and his auctioneers from selling, disposing or dealing with the movable property in dispute. On the return day, the court found that there were a number of issues that it was unable to determine without the reception of *viva voce* evidence. The Court accordingly ordered, *inter alia*, that the matter be referred to trial. In relation to that part of the order, the question that arose on appeal was whether or not it was an order or judgment that was

appealable in terms of s 43(1) of the High Court Act. After reviewing the relevant case authorities, Gubbay CJ crystallised the determinant test, at 344F-345A:

“The question is whether the ‘order’ referring the matter to trial for the hearing of oral evidence amounts to a ‘judgment’ (defined in s 2 of the Act to include ‘a decision or order’), and is decisive or definitive of the rights of the parties and has the effect of disposing of the whole, or at least a portion, of the relief claimed by one of them. Or is it a mere ruling which is a direction as to the manner in which the case should proceed?”

At 346 E-F, the learned Chief Justice answered the question earlier posed as follows:

“[It] is clear that the directive given by Sandura JP was not a judgment. It did not decide the merits. It was merely a procedural ruling that oral evidence was necessary before the factual disputes could be determined. Consequently, and by virtue of s 43(1) of the Act, it was not appealable.”

The decision of this court in *ZFC Ltd v Geza* 1998 (1) ZLR 137 (S) is also very pertinent. After the holding of disciplinary proceedings, an employee had been dismissed by the appellant, her employer. On review, the High Court found that there were certain irregularities in the disciplinary proceedings and ordered that the matter be remitted for a rehearing. The appellant, who was dissatisfied with this order as the respondent had sought an order that her company reinstate her or pay damages, a remedy which was one that could only be obtained on appeal and not on review, then appealed to the Supreme Court. At the hearing of the matter, the point was raised whether or not the order granted by the High Court was an interlocutory order. Applying the *dicta* cited above from *Jesse’s* case, McNally JA dealt with the question, at 144A-E, as follows:

“There is a difference, of course, between referring a matter to trial, and remitting a matter for rehearing. In the former case, there is in effect a decision not to decide. The matter was unresolved when it came before the court, and it remained unresolved. In the latter case, the matter was resolved when it came before the

judge. Miss Geza had been dismissed. That dismissal has now, albeit not in so many words, been set aside.

In my judgment, this was not ‘a mere ruling as to the manner in which the case should proceed’. The case had been finalised. Miss Geza had been dismissed, and had not appealed beyond the general manager. The decision of the learned judge reversed that situation. It reopened a matter which was closed. Part of the relief sought – that her dismissal be set aside – was granted.

Accordingly, I accept that the matter was properly before us by way of appeal without leave.”

The critical criterion of the finality or otherwise of a given order or judgment, in determining the need for leave to appeal, was also reaffirmed and applied by Malaba DCJ in *Blue Rangers Estates (Pvt) Ltd v Muduviri & Another* 2009 (1) ZLR 368 (S) at 376, 379; and more recently by Chidyausiku CJ in *Minister of Higher and Tertiary Education v BMA Fasteners (Pvt) Ltd & Another* SC 33-2017, at pp. 5-6 of the cyclostyled judgment.

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Analysis of Case Authorities

Before analysing the case authorities on the subject, it is necessary to address the import of s 6 of our Supreme Court Act. Mr. *Nyambirai* submits that this provision, in its express reliance on the prevailing law and practice observed in England by the Court of Appeal, necessitates that it is English law that we must turn to for the determination of the procedural question presently under review. Advocate *Mpofu* takes a different view. He contends that the practice observed in England is only to be resorted to if there is no adequate provision on the matter in issue in the Supreme Court Act or the Rules made thereunder. He further argues that the point at hand is one which is governed by the High Court Act and not the Supreme Court Act. Since s 43 of High Court Act makes specific provision on the subject, there is no *lacuna* in our law. Therefore, so he submits, the

English position is of no application and there can be no justification for resorting to the practice of the Court of Appeal in England.

I think that there is merit in both positions. There obviously is no *lacuna* in our law relative to the practice to be adopted on the question of leave to appeal against interlocutory orders or judgments. Thus, s 6 of the Supreme Court Act cannot be invoked to dictate slavish adherence to English practice in resolving the question at hand. Nevertheless, I do not accept that prevailing English practice and precedent can be dismissed as being entirely irrelevant to the question. Given the self-evident similarities between the governing statutory provisions in both jurisdictions, there can be no quarrel with the proposition that English case authorities are highly persuasive in any meaningful analysis of our procedural law.

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Conversely, notwithstanding our affinity with English rather than South African statute law governing civil procedure, I do not perceive any cogent reason for disregarding the South African authorities on the subject, inasmuch as the relevant principles to be applied are not fundamentally dissimilar as between those two jurisdictions. One of those principles, as articulated in the *Pretoria Racing Club* case (*supra*) is that it is not invariably possible to differentiate between purely interlocutory orders and final orders. The court must decide in each case what the specific nature or effect of the order is. The erstwhile tendency in South Africa to lean in favour of findings of finality, so as to avoid potential injustice or inconvenience, did not negate the need to examine the nature and effect of the order in question. The need to do so was also

recognised and affirmed in England, in the earlier decision of the Court of Appeal in *Salaman v Warner* [1891] 1 QB 734 *per* Esher and Fry LJJ (cited in the *Pretoria Racing Club* case at 695-696). In my view, the finality or otherwise of an order or judgment still remains the central and ineluctable consideration in determining whether the order or judgment is appealable with or without leave.

Turning to *Senior's* case (*supra*), it is clear that the nature of the contested order was not argued before or considered by the Court of Appeal. Indeed, the court granted leave to appeal without deciding whether the order appealed against was final or merely interlocutory. The questions to be decided by the court and the *rationes decidendi* enunciated in the individual opinions of the court were entirely unrelated to that issue. Thus, the *dicta* propounded by Lord Denning in that regard were undoubtedly *obiter*. As for the summons or subpoena in question, both Orr and Scarman LJJ took the position that its issuance was an administrative and not a judicial act. Both learned judges also agreed that the aggrieved party should first apply to the issuing court to set it aside. But neither postulated that leave to appeal was required against any decision of that court refusing to set the subpoena aside.

Apart from these considerations, what emerges clearly from *Senior's* case is that under the applicable County Court Rules a subpoena *duces tecum* is issued not by the court but by its registrar, who is under an obligation to issue it upon application being made, as a matter of course and without the need for any order of the court. The critical distinction in the case before us is that it is not the registrar of the court but the court

itself, acting in terms of s 6 of the Fiscal Appeal Court Act, which exercises the power to order or direct its registrar to issue the subpoena. In this instance, the issuance of the subpoena is not a purely administrative but quasi-judicial act.

In *Mwatsaka's* case (*supra*) the principal issue for determination was the distinction between simple interlocutory orders, which are appealable with leave, and mere procedural rulings, which are not appealable at all, even with leave. The *dicta* of the learned judge relative to interlocutory orders having final effect were not central to his decision and were, therefore, clearly *obiter*. However, I am unable to discern any contradiction in those *dicta* and I consider them to be very relevant to the arguments *in casu*. I also regard the court's observations pertaining to the balance of convenience and expense, in deciding whether or not to grant leave to appeal, as being equally apposite to the question as to whether or not leave to appeal is necessary. In any event, the court's analysis of the relevant case law aptly elucidates the established principle that interlocutory orders which are final in nature or effect are appealable without leave.

Jesse's case (*supra*) was focused on s 43(1) of the High Court Act, *i.e.* the right of appeal rather than leave to appeal. Nevertheless, the determinant test expounded in that case is equally applicable to the interpretation of s 43(2)(d) of the Act. That test is whether the order or judgment in question is decisive or definitive of the rights of the parties and has the effect of disposing of the whole or portion of the relief claimed by one of them.

This principle was reaffirmed and applied in the *ZFC Ltd* case (*supra*), where part of the relief sought by the respondent, *i.e.* the reversal of her dismissal from employment, had been granted by the court *a quo*. The appellate court found that this aspect had been resolved and finalised by the lower court. That being so, the right of appeal against its decision arose without the need for leave to appeal.

Disposition

In the instant case, the court *a quo* ordered its registrar to issue the impugned subpoena. Thereafter, on application having been made to set it aside, the court delved fully into the substantive merits of the application and delivered a very detailed judgment dismissing the application. In my view, the court's judgment had a decisive and definitive effect on the rights of the parties and disposed of the relief claimed by both parties, *i.e.* either the enforcement or the setting aside of the subpoena. It effectively disposed of and finalised the only dispute between the appellants and the first respondent. The subpoena issued by the court through its registrar had to be carried into effect, compelling the second appellant to appear in court to testify and produce the requisite documents.

In the specific circumstances of this case, it is clear that the judgment of the court *a quo* cannot be revisited by that court at any stage. The appellants can only object, if so inclined, after they have complied with that judgment. Insofar as that court is concerned, its decision on the validity or enforceability of the subpoena is *res judicata*. Moreover, there would be little point in the appellants mounting an appeal at the end of the main case in the court below. It would undoubtedly be tantamount to a *brutum fulmen*. Finally,

having regard to the time and expense that would be involved in complying with the terms of the subpoena, as was recognised by the court *a quo* itself, it seems to me that the balance of convenience tilts in favour of the appellants being allowed to appeal without leave on the particular facts of this case.

In the result, I take the view that the point *in limine* raised by the first respondent should be dismissed with costs. It be and is hereby so ordered. The Registrar is directed to set the matter down for hearing of the merits of the appeal on the earliest available date.

GOWORA JA:

I agree.

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HLATSHWAYO JA:

I agree.

Mhishi Legal Practice, appellants' legal practitioners
Mtetwa & Nyambirai, 1st respondent's legal practitioners
Kantor & Immerman, 2nd respondent's legal practitioners