

REPORTABLE (25)

TECHNOIMPEX JSC

v

**(1) RAJENDRAKUMAR JOG (2) TECHNOIMPEX JC (PRIVATE)
LIMITED (3) SARAH HWINGWIRI (4) REGISTRAR OF DEEDS
(5) THE SHERIFF OF THE HIGH COURT OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA, & KUDYA AJA
HARARE: 28 MAY 2021 & 22 FEBRUARY 2022**

T. Mpofu, for the appellant

D. Sanhanga, for the first respondent

L. Uriri, for the second and third respondents

No appearance for the fourth to the seventh respondents

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UCHENA JA: This is an appeal against the whole judgment of the High Court dated 13 August 2020, striking off the roll the appellant’s application for rescission in HC 6771/19 of a default judgment granted in favour of the respondents in HC 12074/16 and granting a consent order, which dismissed an interdict granted against the respondents in HC 6784/19.

At the hearing of the appeal Ms *Sanhanga* for the first respondent and Mr *Uriri* for the second and third respondents raised points *in limine* on the validity of the appellant’s notice of appeal. They submitted that there is no valid appeal before the court because the appeal was

noted without leave of the court against an interlocutory order and was also noted against a consent order. This judgment is restricted to the determination of these preliminary points.

FACTUAL BACKGROUND

The facts of the case can be summarised as follows;

The appellant (Technoimpex JSC) is a company duly incorporated in terms of the laws of Bulgaria. It is the registered owner of an immovable property in Harare, Zimbabwe known as Lot 12 of Lot 15 Block C of Avondale, commonly referred to as Bath Mansions Flats at number 32 Bath Road, Avondale, Harare held under Deed of Transfer number 1657/89. In case number HC 6784/19 it applied for an interdict against the first to the third respondents who it alleged wanted to steal its property. The High Court granted the application. In arriving at the decision to grant the provisional order it said:

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“From the history of the matter that I outlined above the applicant has always been the lawful owner of Bath Mansions Flats. The judgment I referred to (*sic*) showed he was successful in warding off the efforts of the first and second respondents to steal the property. For that reason, the applicant has a real right in the property. Once the property has been transferred to a third party the applicant is likely to suffer irreparable harm. In this case the second respondent has applied for a rates clearance certificate to enable her to transfer title of the property to third respondent. Such harm is apprehended. In my view the balance of convenience favours the granting of the relief sought until a lasting solution to the saga is found. There is therefore no other effective alternative remedy other than granting the relief sought. The application will succeed and I grant the following order.”

IT IS ORDERED THAT

TERMS OF FINAL ORDER SOUGHT.

INTERIM RELIEFF

- “1. The 1st Respondent be and is hereby interdicted from transferring Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under Deed of Transfer No 1657/89 and currently held in favour of 1st Respondent under deed of Transfer No 1080/2019 and certificate of registered title no. 1081/2019 to 3rd Respondent or any other persons.
2. 1st 3rd 4th and 5th Respondents be and are hereby interdicted from transacting on and/or facilitating any process for the transfer of Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under Deed of Transfer no. 1657/89 and currently held held in favour of 1st Respondent under Deed of Transfer no. 1080/2019 and certificate of registered title no. 1081/2019 unless with specific leave of the court hearing this matter”
3. -----
4. The Registrar of Deeds and all the Respondents cited herein be and are hereby interdicted from facilitating or passing further transfer of Lot 12 of Lot 15 Block C of Avondale Harare, previously held under Deed of Transfer Number 1657/89 and currently held in favour of 1st Respondent under Deed of Transfer no 1080/2019 and certificate of registered title no. 1081/2019, commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare.
5. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from advertising, selling, pledging, ceding, mortgaging, donating or in any way encumbering or alienating Lot 12 of Lot 15 Block C Avondale Harare.
6. Pending the determination of this matter and High Court Case no. 2012/2018, whichever is the later, the Sheriff of the High Court be and is hereby directed to serve notices, court process, pleadings, orders issued by any person or litigant (sic) be served on Applicant’s legal practitioners mentioned in para 3 above.
7. Pending the determination in High Court Case no. HC 12074/16 or the application for rescission of default judgment granted in High Court matters HC 2972/17 and HC 11246/17 whichever will be the later, the Sheriff of Zimbabwe be and is hereby ordered not to carry out any eviction at 32 Bath Road Avondale Harare in terms of any litigation commenced after 13 September 2016 by any person without the leave of the Court hearing the present matter.”

It is apparent from the provisional order that it had various interdicts protecting the appellant from possible harmful conduct by the first, second and third respondents. In subsequent proceedings before Musithu J for the confirmation of the provisional order in

HC 6784/19, the parties agreed that the provisional order's fate shall depend on the court's decision on the merits, in the application for rescission in HC 6771/2019. The court *a quo* commented on that agreement as follows:

“Mr Magwaliba advised that case Number HC 6784/19 was setdown before Musithu J for the confirmation or discharge of the Provisional Order and that the parties agreed that the Provisional Order be extended until a determination is made in this matter. In the event that this Court finds for the applicant the parties agreed that the Provisional Order be confirmed and that if the court finds against the applicant the Provisional Order will be discharged. Ms *Sanhanga* for the first respondent and Mr *Uriri* for the second and third respondents confirmed the above terms of the agreement. I have had sight of the order issued by Musithu J in HC 6784/19. It indeed extends the Provisional Order in HC 6784/19 until the determination of the present matter”.

In HC 6771/19 the court *a quo* in determining the application before it said:

“I have reached the conclusion that the applicant has not shown the deponent's authority by furnishing a resolution. The effect of this is that there is no founding affidavit before the court. A court application must be supported by a founding affidavit. No. SC 120/22 a founding affidavit there is no application. **All things being equal that No. SC 361/2008 such that I did not have to dispose of the question of *locus standi* which I determined only because its factual basis was related to the question of lack of authority. The primary basis of my judgment is that the application is not authorised. It is thus a nullity. There is therefore, nothing before me to dismiss. The only appropriate order is an order striking the matter off the roll.**” (emphasis added)

It in the result ordered as follows:

1. That the application is struck off the roll with costs.
2. The Provisional Order granted in case number HC 6784/19 on 9 October 2019 is, by consent of the parties, discharged with costs”.

Aggrieved by this decision, the appellant noted the present appeal. Before the appeal could be heard on the merits Counsels for the respondents raised preliminary issues on the

validity of the appellant's notice of appeal. They submitted that the notice of appeal is invalid because it appeals against a consent order and an interlocutory order.

SUBMISSIONS MADE BY THE PARTIES ON THE PRELIMINARY ISSUES.

Ms *Sanhanga*, for the first respondent, argued firstly that the notice of appeal was defective as the appellant sought to appeal against an order made by consent in HC 6874/19. Secondly, she submitted that the appeal was also defective in that it related to an interlocutory order of which leave to appeal was neither granted nor sought. Lastly, she submitted that the matter should be struck off the roll as there is no valid appeal before the court.

Mr *Uriri* for the second and third respondents agreed with the first respondent's Counsel. He submitted that the appellant's representative's reliance on a power of attorney instead of a resolution by the Board of the appellant's Directors Judgment No. SC 29/22
Civil Appeal No. SC 361/20 application in HC 6711/19 fatally defective. He submitted that the court *a quo* therefore correctly struck the application off the roll. He further argued with reference to the discharge of the provisional order as a result of the striking off the roll, of HC 6771/19, that a decision is not only a decision on the merits but can also be a decision on the basis of technical objections. Mr *Uriri* submitted that the court *a quo* made a determination on fatal procedural defects which is a decision of the court against the appellant which triggered the coming into operation of the parties' agreement by consent before Musithu J.

Counsel for the second and third respondents also agreed with the first respondent's counsel that there was a consent order which could not be appealed against and once that is

accepted, the notice of appeal becomes invalid. He therefore submitted that his clients are entitled to costs as they have been forced to defend themselves against an invalid appeal.

In response Mr *Mpofu* for the appellant argued that the order of the court *a quo* was not by consent as the appellants agreed to a course of action and not to the result of the court *a quo*. He also submitted that consent to a course of action does not amount to a concession to the correctness of the judgment. He thus submitted that since the judgment of the court *a quo* was not a consent order it could be appealed against.

In respect of the interlocutory order he argued that it had a final effect and could thus be appealed against without leave of the court.

THE ISSUES

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Two issues arise for the determination of the preliminary points raised. The issues for determination are:

1. Whether or not the appellant consented to the order granted in para 2 of the court *a quo*'s order and could therefore not appeal against it.
2. Whether or not the appellant can appeal against the order issued in HC6771/19 without the leave of court.

THE LAW

The law applicable to the facts of this case is as follows:

It is an established principle of the law that a litigant cannot appeal against an order by consent. The notice of appeal would be fatally defective for lack of compliance with s 43(1) as read with s 43(2)(c)(i) of the High Court Act [Chapter 7:06].

Section 43(2)(i) of the High Court Act provides as follows:

“43 Right of appeal from High Court in civil cases

- (1) ...
- (2) No appeal shall lie
- (c) from—
 - (i) an order of the High Court or any judge thereof made with the consent of the parties; or...

Section 43(2)(c)(i) of the High Court Act clearly establishes that when a party consents to the granting of an order by a court or a judge he or she cannot appeal against the consent order.

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In the case of *Thambi v Stalka NO & Anor 1946 TPD 297 ROPER J* reasoned that there could be no appeal against a judgment by consent given under the South African Magistrates Court Act 32 of 1944. He at p 300 said:

“It is impossible to imagine any circumstances in which a party could appeal against a judgment by consent; he might have good grounds for setting aside or varying such a judgment but he would not and could not appeal against it.”

Consent to a court order by the parties, leading to the granting of a consent order is a decision consciously made by the parties fully appreciating the facts and the law applicable to the dispute between them. The consent cannot be based on facts which were not in the contemplation of the parties. It is an order granted by the court at the instance of the parties.

It is also trite that a party to proceedings in which the court grants an interlocutory order cannot appeal against such an order without the leave of the court. Section 43(1) provides as follows:

“43 Right of appeal from High Court in civil cases

- (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
- (2) No appeal shall lie—
 - (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.”** (emphasis added)

There are exceptions to the requirement for leave to appeal against an interlocutory order. The three exceptions are:

- 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.

A party can therefore only appeal against an interlocutory order without leave of the court if the decision appealed against falls under one of the three exceptions.

1. WHETHER OR NOT THE APPELLANT CONSENTED TO THE ORDER GRANTED IN PARA 2 OF THE COURT A QUO'S ORDER AND COULD THEREFORE NOT APPEAL AGAINST IT.

The appellant's Counsel submitted that the appellant did not consent to the order granted by Tagu J dismissing the interdict he had previously granted as a provisional order. On the other hand Counsels for the first respondent and the second and third respondents submitted that the order was granted with the consent of all parties.

The facts of this case establish that the order was preceded by the parties appearing before Musithu J before whom the confirmation or discharge of the provisional order granted by Tagu J in HC 6784/19 had been set down. Parties discussed the way forward which was presented to Musithu J by Advocate Magwaliba who was representing the applicant who is now the appellant. At p 483 of the record Mr Magwaliba made the following submissions to Musithu J:

“My lord my learned friend approached me and suggested that the order granted by his lordship the Honourable Tagu J being a provisional order which granted interim relief protecting the applicant, remains in force and protects the applicant in the interim in respect of the property mentioned therein. And then the substantive issues will be resolved within the context of the application for rescission of judgment in HC 6771/19. It occurs to me my lord that once the judgment in issue which gave rise to this transfer is set aside as we expect in HC 6771/19 or is not set aside as my learned friends for the respondent expect, the question of the confirmation of Justice Tagu's order becomes resolved.”

Pages 484 to 485 of the record of appeal establish that, while parties were still presenting their agreed positions to Musithu J the following exchange took place between Musithu J and Advocate Magwaliba, for the appellant, who was then the applicant:

“Musithu J: So essentially if I understand your earlier submission, Advocate Magwaliba I am confirming the interim relief by Tagu J. As of 9 October 2019?”.

“ADV Magwaliba: No, no my lord. The confirmation of that order will entail granting final relief which is not what the parties have agreed. The parties have agreed to extend the provisional order. **So the provisional order remains, parties will then direct argument in relation to HC 6771/19 which has the effect of resolving the final relief sought before Justice Tagu.**”(emphasis added)

When the parties appeared before Tagu J, Advocate Magwaliba who was representing the applicant, who is now the appellant introduced the parties agreement to the judge on p 489 as follows:

“The position which pertains therefore my lord, **is that by resolving HC 6771/19 necessarily the provisional order will either be discharged if rescission is not granted, confirmed if rescission is granted.** That is the basis upon which I referred that matter to the court. **But there will be no argument in relation to HC 6784/19 because that argument will be encapsulated in HC 6771/19—**“ (emphasis added)

The submissions by Advocate Magwaliba before Musithu J and Tagu J are clear. The parties wanted the provisional order to be extended so that its fate would be tied to that of the court *a quo*'s decision on the merits in HC 6771/19. There is nothing in his submissions before the two judges and his exchange with Musithu J which suggests that any other decision in HC 6771/19 should result in the discharge or confirmation of the provisional order. There is however need to establish whether or not the parties consented to the order granted by the court *a quo* in para 2 of its order.

A consent to a court order is a decision consciously made by a party fully appreciating the facts and the law applicable to the dispute between the parties. Consent to a court order cannot be based on facts which were not in the contemplation of the parties. In this case the parties clearly agreed that the confirmation or discharge of the preliminary order issued

by Tagu J would be dependant on whether or not the application for rescission in HC 6771/19 was granted or dismissed on the merits. In making his presentation before Musithu J Mr Magwaliba said:

“And then the substantive issues will be resolved within the context of the application for rescission of judgment in HC 6771/19. It occurs to me my lord that once the judgment in issue which gave rise to this transfer is set aside as we expect in HC 6771/19 or is not set aside as my learned friend for the respondent expects, the question of the confirmation of Justice Tagu’s order becomes resolved.” (emphasis added)

I am satisfied that the parties did not agree that the fate of the provisional order granted by Tagu J in HC 6784/19 be determined by the striking off the roll of the application in HC 6771/19. The parties’ agreement was that the fate of the provisional order was to depend on whether or not the application for rescission in HC 6771/19 was to be granted or dismissed. In clarifying what the parties had agreed on, to Musithu J, Mr Magwaliba said:

“The parties have agreed to extend the provisional order. So the provisional order remains, parties will then direct argument in relation to HC 6771/19 which has the effect of resolving the final relief sought before Justice Tagu.”(emphasis added)

Parties agreed that they had to make submissions which would enable the court *a quo* to make a decision on the merits which would resolve the issue of whether or not the provisional order could be confirmed or set aside. This did not happen as the application for rescission was struck off the roll an event which was not in the contemplation of the parties.

In *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at p 496, this Court stated that an order by consent “extinguishes any cause of action that existed.” In this case the striking off the roll of the application did not extinguish the cause of

action between the parties. It merely delayed its determination as the striking of the matter off the roll does not prevent the appellant from filing another application on the same cause of action.

Therefore, the fact that the order granted by Tagu J striking the application in HC 6771/19 off the the roll was not consented to by the parties means the appellant's appeal against para 2 of the court *a quo*'s order is properly before this Court. The respondents' preliminary issue on this point should be dismissed.

2. WHETHER OR NOT THE APPELLANT CAN APPEAL AGAINST AN INTERLOCUTORY ORDER ISSUED IN HC 6771/19 WITHOUT THE LEAVE OF COURT.

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In arriving at the decision to strike the matter off the roll the court *a quo* said:

“I have reached the conclusion that the applicant has not shown the deponent's authority by furnishing a resolution. The effect of this is that there is no founding affidavit before the court. A court application must be supported by a founding affidavit. Without a founding affidavit there is no application. All things being equal that finding is such that I did not have to dispose of the question of *locus standi* which I determined only because its factual basis was related to the question of lack of authority. The primary basis of my judgment is that the application is not authorised. It is thus a nullity. There is therefore, nothing before me to dismiss. The only appropriate order is an order striking the matter off the roll.” (emphasis added)

The application before the court *a quo* was a nullity because the deponent to the founding affidavit had no authority to represent the company. The appellant's failure to present before the court *a quo* a resolution by the appellant's board of directors authorising him to

represent the appellant, was fatal to the application. There was nothing before the court *a quo* to dismiss and the only appropriate order was to strike the matter off the roll.

In the light of the above considerations, and the law as provided by s 43(2)(d) of the High Court Act, I am of the view that the appellant had no right to appeal against the court *a quo*'s interlocutory order without the leave of the court. Section 43(2)(d) of the High Court Act provides as follows:

- “(2) No appeal shall lie
(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”. (emphasis added)

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The exceptions under (i) to (iii) do not apply to the striking off of the application in HC 6771/19 from the roll. The appeal against para 1 of the court *a quo*'s order is therefore a nullity.

If there was no matter before the court *a quo*, there is therefore also nothing before this Court. In *Jensen v Acavalos* 1993 (1) ZLR 216 (S) KORSAN JA at 220B said that the reason why a fatally defective notice of appeal could not be amended was that:

“... it is not only bad but incurably bad”.

In *casu* there was no proper resolution thus there was no proper application for rescission before the court *a quo*. The appeal before us in respect of the interlocutory order

is fatally defective and cannot even be amended. In *ZOU v Ndekwere* SC 52/19 at p 18 Garwe JA (as he then was) commenting on defective processes said:

“Once the court had determined that all the grounds of appeal before it were attacking factual findings and not issues of law, it should have found that there was, therefore, no proper appeal before it. **And if there was no proper appeal before it, there was, in fact, nothing before it. And if there was nothing before the court, there was therefore nothing to dismiss. The only appropriate course of action, in these circumstances, would have been to strike the matter off the roll.**(emphasis added)

It is clear that the notice of appeal against the striking of the application in HC 6771/19 off the roll in this case does not comply with 43(1) and (2)(c)(i) of the High Court Act . It is fatally defective. The matter must therefore be struck off the roll.

DISPOSITION

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In the result, the preliminary objection in respect of para 1 of the court *a quo*'s order has merit and for that reason there is no valid appeal against para 1 of the court *a quo*'s order before this Court. In respect of para 2 of the court *a quo*'s order I have found that there was no agreement between the parties that if the application in HC 6771/19 was struck off the roll then the provisional order granted in HC 6784/19 would be discharged. Both parties have succeeded on one of the issues. Therefore each party should bear its own costs.

It is therefore ordered that:

1. The notice of appeal against para 1 of the court *a quo*'s order is a nullity.
2. The matter is hereby struck off the roll.
3. The notice of appeal against para 2 of the court *a quo*'s order is valid.

4. The appeal against para 2 of the court *a quo*'s order should proceed to a hearing on the merits.
5. The Registrar is instructed to set it down before the same bench for hearing at the earliest convenient date.
6. Each party shall bear its own costs.

GUVAVA JA: I agree

KUDYA AJA: I agree

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Rubaya Chinuwo, 1st respondent's legal practitioners

Farai Nyamayaro Law Chambers, 2nd and 3rd respondent's legal practitioners

Mutumbwa Mugabe & Partners, appellant's legal practitioners