REPORTABLE (46)

(1) GAYNOR CHITSAKA (2) HERBERT MAWEMA (3) BHEREBENDE LAW CHAMBERS (4) W.O.M SIMANGO & ASSOCIATES
v
(1) LORRAINE ELIZABETH HEYNS (2) KURT LOUIS HEYNS (3) PETERSON MAVARAIDZE (4) BELIEVE GUTA (5) EZEKIEL CHINOINGIRA (6) AGRIPPA BANDA (7) DONALD JARAVAZA (8) ADMIRE GOWERA (9) ALOUIS MABHUNU (10) ISHEANESU MUTERO (11) CHRISTABEL MAFIRAKUREWA (12) BALWEARIE HOLDINGS (PRIVATE) LIMITED (13) GATOOMA DEVELOPMENT CORPORATION (PRIVATE) LIMITED (under liquidation) (14) PARAGON REAL ESTATE (PRIVATE) LIMITED (15) SABRE SERVICES (PRIVATE) LIMITED (16) SINYORO & PARTNERS (17) REGISTRAR OF DEEDS AND COMPANIES (18) SHERIFF FOR ZIMBABWE (19) MASTER OF THE HIGH COURT (20) KADOMA CITY COUNCIL

SUPREME COURT OF ZIMBABWE
MAKONI JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 13 MARCH 2023 & 29 MAY 2023

L. Madhuku, for the appellants

Z. T. Zvobgo with *S. Chigumira*, for the first and second respondents

Fourth respondent in person

MAKONI JA:

1. This is an appeal against the entire judgment of the High Court ("the court *a quo*"), wherein it dismissed the appellants' point *in limine* that the respondents' application before it was a nullity for non-compliance with r 59 of the High Court Rules, 2021, ("the Rules").

2. At the hearing of the appeal, Mr *Zvobgo* for the first and second respondents, raised a point *in limine* to the effect that the present appeal was fatally defective for the reason that it had been noted without the leave of the court *a quo*, as the appeal is against an interlocutory order. This judgment will, thus, be confined to the determination of this point *in limine*.

FACTUAL BACKGROUND

3. The parties are embroiled in a dispute over ownership of an immovable property known as a Certain Piece of Land Situate in the District of Hartley, called the Remainder of Westhey of Sabonabon Estate measuring 97 0653 hectares and held under Deed of Transfer Number 4110/92, ("the property"). The first and second respondents approached the court *a quo* by way of an urgent court application for an order declaring certain court applications, instituted under the various case numbers, stated in their draft order, to be null and void *ab initio*; a declaration that the company known as Balwearie Holdings (Private) Limited registered under Company Number 45/77 is the legitimate owner of the property and an order that the first, second and twelfth respondents have no enforceable rights or interests in the property. They also sought a declaration that the first to eighteenth respondents have acted in common purpose to illegally acquire title in the above-described immovable property. Further, there was consequential relief which was being sought as detailed in the draft order.

4. The application was opposed by the appellants as well as the third to the eighteenth respondents. Following indications from some of the parties that they had preliminary

objections to raise, the court *a quo* directed that the parties file their opposing papers. The appellants, in their opposing papers, raised two preliminary points namely (a) whether the application was fatally defective and therefore invalid for noncompliance with r 59 of the Rules, and (b) whether the matter was urgent.

PROCEEDINGS BEFORE THE COURT *A QUO*

5. The appellants submitted that the court application was fatally defective for non-compliance with r 59 of the Rules, in that it was not in the prescribed form. They further submitted that the form used did not contain the mandatory plethora of procedural rights which are designed to inform them of their rights and obligations in relation to the application. In response, the respondents submitted that the form used substantially complied with the requirements of r 59. In the alternative, they argued that the court could invoke its inherent powers to deal with the application notwithstanding the failure to comply with the exact form required by the rules.

6. The appellants further challenged the hearing of the application on an urgent basis mainly on two grounds. Firstly, they contended that the certificate of urgency did not show that the certifying legal practitioner applied an independent mind to the matter. Secondly, they argued that the circumstances of the matter did not reveal any form of urgency.

FINDINGS OF THE COURT *A QUO*

7. The court *a quo* found that the current Form 23 is what used to be Form 29 of the now repealed High Court Rules, 1971. It does not contain the *dies induciae*. This is provided

for in r 59(6). Contrary to the submission made on behalf of the appellants, the period of ten days is not a mandatory requirement. The Rules refer to a *dies induciae* of "not less than ten days". It further found that the Rules allowed a court application to specify a shorter period of a *dies induciae*, if the court, on good cause shown, agrees to such a shorter period.

8. Whilst the court *a quo* agreed that the form used by the first and second respondents was defective because it did not inform the appellants of the nature and scope of the notice of opposition; the consequences of a failure to file opposing papers within the *dies induciae* specified in the court application and the failure to specify the High Court station at which the opposing papers were to be filed, the court found that such defects were not fatal to the application and did not prejudice the respondents in any manner. Consequently, it dismissed the point *in limine* challenging the validity of the application.

9. In relation to the issue of urgency, the court *a quo* held that there was no requirement for a certificate of urgency in an urgent court application. The court stated that the certificate of urgency was only required in urgent chamber applications, in line with the provisions of rr 60(4) (b) and 60(6) of the Rules.

10. The court further made a finding that the application before it did not specify when the need to act arose and, on this point alone, it held that the matter before it was not urgent. The court further held that the irreparable harm, which the first and second respondents would suffer, had not been established. The court also ruled that the declaratory and

consequential relief being sought by the first and second respondents did not qualify for an urgent hearing.

11. As a result, the court *a quo* ordered that the matter be struck off the roll of urgent matters. It also ordered that the respondents file opposing papers, on the merits of the matter, within ten days of the order.

THE APPEAL

12. Dissatisfied by the decision of the court *a quo*, the appellants noted the present appeal on the following single ground:

GROUND OF APPEAL

13. The proceedings in the court *a quo* were void *ab initio* for the reason that the purported application by the first and second respondents was a nullity for non-compliance with r 59(6) of the High Court Rules, 2021, with the result that the court *a quo* erred in law in not so finding and in:

1.1 striking off the matter from the roll of urgent matters as there is no such roll for urgent court applications and;

1.2 ordering the appellants to file opposing papers to a nullity.

14. The appellants pray that the appeal be allowed with costs and that the judgment of the court *a quo* be set aside and substituted with an order upholding the point *in limine* regarding the invalidity of the application and that the application be struck off the roll.

SUBMISSIONS BEFORE THIS COURT

15. Mr *Zvobgo*, for the first and second respondents, submitted that the appeal was invalid as a result of the appellants' failure to seek leave to appeal. He argued that the judgment which was being appealed against was an interlocutory order. As such, in terms of s 43 (2) (d) (i) of the High Court Act [*Chapter 7:13*] (the Act), the appellants ought to have obtained leave to appeal before lodging their appeal.

16. Mr *Zvobgo* prayed for *costs de-bonis propriis* on the basis that the first and second respondents had written a letter to the appellants advising them of the need to seek leave before noting the appeal, which letter the appellants ignored. He further added that the appellants failed to address the case authorities that the respondents had highlighted in their letter and in their heads of argument. He further contended that amongst the appellants were legal practitioners who should know the law. He further argued that the appellants' counsel was not new to the issue of seeking leave in relation to interlocutory orders. He submitted that Mr *Madhuku* argued the matter in *Mogola Enterprises (Private) Limited v Old Mutual Property Investment (Private) Limited* SC 26/20 where the matter was struck off the roll on account of failure to seek leave. In the event that the court was not inclined to award costs *de bonis propriis* counsel sought costs on a higher scale for the reason that the appeal was lodged mainly to frustrate the proceedings *a quo.*

17. *Per contra*, Mr *Madhuku* for the appellants, argued that the dismissal of the preliminary point which they had raised before the court *a quo* resulted in a decision which was final and definitive. He submitted that the preliminary point went to the root of the application

that was before the court *a quo*, hence, the decision was not interlocutory. Counsel contended that the dismissal of the preliminary point yielded an automatic appeal thus there was no need to seek leave to appeal. Regarding costs, Mr *Madhuku* stated that both *costs de bonis propiis* and costs on a higher scale were unwarranted.

THE ISSUE

18. The present appeal can be disposed of by the determination of the question whether the order granted by the court *a quo*, dismissing the appellants' preliminary point regarding the invalidity of the application before it, was an interlocutory order.

THE LAW

19. The question whether an order is interlocutory or not is a well-trodden path within and outside this jurisdiction. In the *locus classicus, South Cape Corp* v *Engineering Management Services* 1977 (3) SA 534 (A) at 549G-550A the court, in defining what an interlocutory order is, stated the following:

> "(a) In a wide and general sense the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:
>
> (i) those which have a final and definitive effect on the main action; and
>
> (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not. (See generally *Bell v Bell*, 1908 T.S. 887 at pp. 890 - 1; *Steytler, N.O.* v *Fitzgerald, supra* at pp. 303, 311. 325 - 6, 342; *Globe and Phoenix Gold Mining Co. Ltd. v Rhodesian Corporation Ltd.*, 1932 AD 146 at pp. 153, 157 – 8, 162-3; *Pretoria Garrison Institutes v Danish Variety Products, supra* at pp. 850, 867.)
>
> (b) Statutes relating to the appealability of judgments or orders (whether it be appeal ability with leave or appealability at all) which use the word "interlocutory", or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple

interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation (see generally *Steytler's* case, *supra* at pp. 304, 312,326, 345 - 6;

(c) The general test as to whether an order is a simple interlocutory one or not was stated bySCHREINER, J.A., in the *Pretoria Garrison Institutes* case, *supra*, as follows (at P. 870):

> "... a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might
> be given at the hearing'."

The above position of the law has been followed in this jurisdiction as enounced in a number of cases: See *Gillespies Monumental Works P/L v Zimbabwe Granite Quarries P/L 1977 (2) ZLR 436 (H)*; *Mwatsaka v ICL Zimbabwe* 1988 (1) ZLR 1 (H); *Mogola Enterprises (Private) Limited v Old Mutual Property Investment (Private) Limited supra*; *Al Shams Global BVI Limited* v *Deposit Protection Corporation & Ors* SC–52–22;

20. *In Trust Merchant Bank Limited v Mako Properties (Pvt) Ltd t/a Musuna Safaris & Travel* SC 73–2002 Chidyausiku CJ restated the applicable test on whether an order is interlocutory as follows;

> "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 305 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"." (emphasis supplied)

21. MALABA DCJ (as he then was) in the case of *Blue Ranges Estates (Pvt) Ltd* v *Muduviri and Anor* 2009 (1) ZLR 368 (S), at p 376G-H further elaborated on the test as follows:

> "To determine the matter one has to look at the nature of the order and its effect on the issues or cause of action between the parties and not its form. An order is final and definitive because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. An order for discovery or extension of time within which to appeal, for example, is final in form but interlocutory in nature. The reason is that it does not have the effect of determining the issues or cause of action between the parties." (underlining for emphasis)

22. The learned authors **Herbstein and Van Winsen,** in their book **"Civil Practice of the High Courts of South Africa" (5th ed, Juta) at p 1204** define an interlocutory order as:

> "… an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties."

23. The essential elements of an interlocutory order that are coming out of the above authorities can be summarized as follows;

i. It is an order granted at an intermediate stage in the course of litigation of the dispute between the parties.

ii. It could relate to a preliminary or procedural question that would have arisen in the course of dealing with the main dispute.

iii. The final word still has to be spoken in the suit.

iv. It an order pronounced upon matters incidental to the main dispute, preparatory to, or during the progress of litigation.

v. It can be final in form but interlocutory in nature, in that it does not have the effect of determining the cause of action between the parties.

24. It is a settled principle of law, and is statutorily provided for, that no appeal lies against an interlocutory order without the leave of the court which gave that order, or where it is refused, without the leave of this Court. This is laid out in s 43(2)(d) of the High Court Act [*Chapter 7:06*], in the following manner:

> "43 **Right of appeal from High Court in civil cases**
>
> (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, …"

25. Nevertheless, there are three instances in which an appeal against an interlocutory order may be noted without the leave of court. These three exceptions are provided for in the aforementioned section as follows:

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.

APPLICATION OF THE LAW TO THE FACTS

26. In their heads of argument, the first and second respondents contend that the court *a quo*'s

judgment was not a final and definitive judgment as it did not bring the dispute between the parties to finality.

27. The appellants on the other hand, insist that the court *a quo*'s failure to hold that the proceedings before it were void *ab initio* resulted in a judgment which was final and did not require leave to be appealed against.

28. The court *a quo* was called upon to determine, *in limine*, whether or not the application before it was a nullity. It determined that the application was valid. Such a judgment is appealable without leave for the simple reason that it is not covered by any of the **three** prohibitions in s 43(2) of the High Court Act [*Chapter 7:06*]. A judgment that refuses to find that proceedings before a court are void *ab initio* cannot be interlocutory as it goes to the root of the litigation and has far reaching consequences as to fall outside the contemplation of the word "interlocutory" as used in s 43(2) of the High Court Act [*Chapter 7:06*]. Such a judgment forces a respondent to participate in subsequent proceedings that may be a nullity. This creates an absurdity not contemplated by the legislature in enacting the prohibition relating to "interlocutory" orders. In the circumstances, leave to appeal was not required.

29. In my view the order granted by the court *a quo* fits squarely into the essential elements of an interlocutory order such as I have alluded to above in para 25. The court *a quo* dismissed the point *in limine* raised by the appellants, regarding the validity of the

application before it, and gave an order striking the application off the roll of urgent matters. In so doing, the court did not make a determination on the merits of the dispute between the parties. At the time the court *a quo* made the order "the final word has still to be spoken" regarding the cause of action between the parties. The decision did not bring the rights of the parties, in relation to the dispute between them, to a final and definitive determination. This is fortified by the fact that the court *a quo* went further and directed the respondents, before it, to file notices of opposition to the application, on the merits. The main dispute between the parties was referred to the roll of ordinary court applications for a resolution. This part of the order undoubtedly indicates that the dispute between the parties had not been resolved. It was still awaiting final determination. The decision of the court *a quo*, although final in form, is purely interlocutory in nature, and would certainly require the leave of the court *a quo.*

30. Whilst Mr *Madhuku* was correct that the order issued by the court *a quo* was final, it is only final in form but interlocutory in nature and does not fall under any of the exceptions set out in para (d) of s 43 (2) of the Act. In my view, litigants need to understand that finality of the order is not the determinant factor. One needs to go further and examine the nature of the order. The question that one must ask oneself is whether the order, though final, disposes of the main dispute between the parties. If it does not, then it is an interlocutory order. No absurdity will be created by the main matter proceeding as the appellants can appeal the decision, with the leave of the court *a quo*.

31. This appeal, having been filed without the leave of the court *a quo*, is improperly before the court. Consequently, I uphold the point *in limine* raised by the first and second respondents.

32. There is one issue which has caused me some disquiet, which issue in my view, might have taken this matter this far. It concerns the manner in which the court *a quo* handled the urgent court application before it. When seized with an urgent court or chamber application and points in *limine* are taken, including that the matter is not urgent, the first point to be determined is whether the matter meets the requirements of urgency. If the court determines that the matter is urgent it then goes on to deal with the other points in *limine,* starting with those that have the potential to terminate the proceedings. If the court *a quo* had adopted the correct approach and found, as it did, that the matter was not urgent, it should have ended there. The issue whether the application before the court was valid or not would then have been properly dealt with on the ordinary roll. One can understand the appellants' confusion. When the matter comes up on the ordinary roll for determination, they can no longer raise the issue, regarding the validity of the application, lest they are confronted with a special plea of *res judicata*. That however, in my view, does not change the character of the order. It remains interlocutory in that it determined a procedural issue.

COSTS

33. The first and second respondents seek costs *de bonis propriis* for the reason the appellants were advised of the impropriety of their appeal, by way of a letter, and were

afforded an opportunity to address its shortcomings. Instead, they ignored the correspondence. In their Heads of Argument, they did not address the case authorities referred to them in the correspondence. The conduct of the appellants particularly deserves censure because they are all legal practitioners who are expected to be fully aware of the position of the law regarding appeals against inter-locutory orders. The other reason advanced for such an award is that Mr *Madhuku* represented the appellant in *Mogola supra* where the matter was struck off the roll on account of failure to seek leave.

34. The appellants *per contra* submitted that costs *de bonis propriis* were not warranted in the circumstances of this matter. Mr *Madhuku* submitted that the nature of the order in *Magola supra* was different from the one *in casu*.

35. Costs *de bonis propriis* are not warranted in this matter. Whilst I agree with Mr Z*vobgo* that the appellants, being legal practitioners, should have considered the case authorities referred to in the first and second respondents' letter and heads of argument, and address them in their heads of argument, their case cannot be said to be frivolous and vexatious. The aspects I related to in para 31 may have misled the appellants to believe that the order in issue had a final and definitive effect. Costs on a legal practitioner-client scale will however meet the justice of the case.

DISPOSITION

36. In light of the foregoing analysis, the point *in limine* that leave to appeal should have been

sought must be upheld. The order granted by the court *a quo* has all the attributes of an interlocutory order.

Accordingly, it is ordered as follows:

1. The matter be and is hereby struck off the roll.
2. The appellants shall pay the first and second respondents' costs on a legal practitioner- client scale.

CHIWESHE JA: I agree

CHATUKUTA JA: I agree

Lovemore Madhuku Lawyers, appellants' legal practitioners

Whatman & Stewart Law Firm, 1st and 2nd respondents' legal practitioners