

DISTRIBUTABLE (30)

UNIVERSITY OF ZIMBABWE
v
(1) KWANELE MURIEL JIRIRA (2) LOUIS MASUKO
(3) DEPUTY SHERIFF HARARE

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & PATEL JA
HARARE, JULY 8 & OCTOBER 3, 2013**

R. Goba, for the appellant

D. Ochieng, for the first and second respondents

PATEL JA: At the hearing of this matter, counsel for the respondents raised the preliminary points that the appeal was invalid and that the relief sought by the appellant was incompetent. His argument ran as follows.

Firstly, the court *a quo* determined the application before it by holding that it was not urgent. Its finding as to the absence of jurisdiction only formed part of its reasoning and was purely *obiter*. Again, the court did not enquire into the substantive question as to whether or not the stay of execution sought by the appellant should be granted. It did not make any decision on the merits of the matter and, therefore, its decision was purely interlocutory. Consequently, as the appellant did not seek or obtain

any leave to appeal, as required by law, the appeal is not competent for want of such leave. Additionally, the notice of appeal is also incompetent because it does not state the date when leave to appeal was granted, as is required by Rule 29(1)b) of the Rules of this Court.

Secondly, the relief sought by the appellant is for the dismissal of the points *in limine* raised by the respondents in the court below and for the application before that court to be granted in terms of the draft order. This, it is submitted, is incompetent because the substantive merits of the relief sought were not considered or determined by that court.

Dealing with the first point, section 43(1)d) of the High Court Act [Chapter 7:06] provides that no appeal shall lie from an interlocutory order or interlocutory judgment made or given by a judge of the High Court without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court.

What is to be determined *in casu* is the nature and effect of the decision of the court *a quo*. Prior to that decision, the respondents had obtained a writ of execution against the movables of the appellant to satisfy the sum of US\$291,214.13 awarded by the arbitrator. They had also proceeded to serve an application for a garnishee order on the applicant and its bankers, which operated to freeze the appellant's bank account. Thus, as at the time of its urgent application, the appellant was exposed to the imminent disposal of its library books, computers and other equipment, as well as the inability to access its bank

account. On these facts, we take the view that the court's refusal to deal with the matter as being urgent, whether correctly or otherwise, had the effect of finality. In that sense, the decision was final and definitive and not merely interlocutory.

As for the jurisdictional aspect, the Court is unable to agree with Adv. *Ochieng* that the finding of the learned judge declining jurisdiction to hear the application was simply *obiter*. He specifically addressed his mind to the question of jurisdiction and, having found that no reasons had been advanced for departing from the need to exhaust the remedies available in the Labour Court, he held that "the two preliminary points raised by the respondents must be found in favour of the respondents". This constituted a positive ruling on the jurisdictional point that was not merely ancillary or incidental to the finding of non-urgency. We accordingly hold that the appeal is not incompetent for want of the appellant having obtained leave to appeal from the court *a quo* or from this Court.

Turning to the second point, it is trite that an appeal must be directed against the actual decision that is appealed against. However, it would be premature for us to deal with this aspect of the appeal at this stage. Properly regarded, it cannot be disposed of as a preliminary issue. Rather, it is a matter for determination as and when the appeal is heard on its merits.

In the result, both points *in limine* taken by the respondents are hereby dismissed, with no order as to costs. The appeal is postponed *sine die*.

MALABA DCJ: I agree.

GOWORA JA: I agree.

Ziumbe & Partners, appellant's legal practitioners

Kadzere, Hungwe & Mandevere, 1st and 2nd respondents' legal practitioners