TENKE FUNGULUME MINING S.A.R.L
versus
BRUNO ENTERPRISES (PVT) LTD
(Under Judicial Management)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 14 July and 21 September 2022

Opposed application-Leave to appeal

Advocate *T Mpofu*, for applicant
Advocate *R F Goba*, for respondent

TAGU J: This opposed application is an application for leave to appeal against the judgment of this court under HH 390/21 wherein this court dismissed an application for absolution from the instance for the second time on the same matter after having done so under the main case HC 2036/15.

There is no need for me to go through the facts of this matter which are on record, are set out in HH 390/21 and are at any rate well known to the parties. Suffice to point out that this is not the first time a judgment has been rendered in the application for absolution from the instance brought in this matter by the applicant. The first time was on the 1st of August 2018. The applicant appealed to the Supreme Court after being granted leave to do so by this court. The Supreme Court was of the unanimous view that this court had not pronounced itself on the substantive issues that had been argued before it. The Supreme Court did not specify what issues were raised before this court and were not dealt with save to say these had been placed before the court. The Order in SC 421/19 simply said:

> "**IT IS ORDERED BY CONSENT THAT**:
> 1. The appeal is allowed with costs
> 2. The decision of the court a quo is set aside
> 3. The matter is remitted to the court a quo for determination of all the issues that were placed before it."

In compliance with the Supreme Court order, this court went through its record of proceedings and the record of proceedings before the Supreme Court to understand all the issues that were placed before it. Having identified all the issues, the court rewrote its judgment under HH 390/21 and again dismissed the application for absolution. Dissatisfied again by the second judgment the applicant intends to appeal again, hence the application for leave to appeal again to the Supreme Court.

At the hearing of this application Advocate *T Mpofu* enquired whether the parties as well as the Court were on the same page. That he was enquiring whether or not the respondent had filed its notice of opposition and did nothing further like filing heads of argument. The court having confirmed the position Mr *T Mpofu*, without further ado proceeded to make his submissions followed by those of Mr *R F Goba* without any objections. I found nothing amiss because the present application is against an interlocutory ruling or decision, appeal of which lies to the Supreme Court with leave of Court or judge of the High Court failing which leave of a judge of the Supreme Court. In the present matter the applicant's application is premised on matters of law which the respondent is unable to counter except by making submissions to the judge in chambers and if required submitting heads of argument which base submissions relied upon, in opposing the application. (compare Rule 60 (2). This approach accords with reason and is in keeping with the practice under the High Court Rules 1971, (ref Rule 262, 264 and 265 read with Rule 69)

The new grounds of appeal which the applicant is saying have prospects of success, and which should compel this court to grant the application for leave to appeal are that-

1. The Supreme Court having remitted the matter for a proper determination of the issues raised by appellant, the court aquo erred in simply proceeding to render a determination on the matter without hearing the parties. The applicant's contention is that this is a procedural issue of consequence on which the Supreme Court must pronounce itself. It said the advice it got is that the power to remit a matter means that there must be a reconsideration of the matter on the issues identified by the apex court as warranting remittal. That being the case, there must be a necessity that there be a hearing in the High Court. It said usually parties will abide by positions that are already on record. At times they might, in the context of the pronouncements of the Supreme Court, wish to amplify or clarify their contentions. The bottom line is that they must be afforded the opportunity of being heard. It is up to

them to decide what to do with that opportunity. To the applicant it would be an irregularity for a matter to be dealt with on remittal in the absence of the parties.

The respondent on the other hand submitted that there are no prospects of success on appeal. It argued that the court in proceeding in the manner it did, did the correct thing. It was submitted that the court attended to the issues placed before it. The issues were not stated by the Supreme Court. The court was asked to deal with all issues placed before it and the court did exactly that. The parties were not asked to go back to the court and amply their issues.

I tend to agree with Mr *R F Goba's* thinking and not persuaded by the instructions given to the Applicant by its instructing attorneys that once a matter is remitted there must always be a rehearing. Each case depends on its facts. *In casu*, the instruction from the Supreme Court was clear and unambiguous. The court was asked to consider all the issues placed before it. The record contained all the issues placed before the court. The court in considering all the issues that had been placed before it was bound by the four corners of the record. To allow the parties to appear before the court and start making new submissions would have been tantamount to raising new issues that had not been placed before the court. The court rendered a second judgment based on all the issues placed before it. Whatever criticism may have affected the first judgment HC 2036/15, the second judgment in my view is clear and concise on the issues that the Court was required to determine. The judgment is clear in its reasoning and its conclusion. On this basis alone the appeal would not succeed.

2. The place of the delict having been the Democratic Republic of Congo and the law governing the dispute not having been led, the court a quo erred in coming to the conclusion that appellant could properly be put on its defence. It was contended that the delict on which the applicant was sued was committed in the Democratic Republic of Congo, and that being the case the laws of the Democratic Republic of Congo govern the matter and must have been led in evidence. Those laws were not led in evidence. The applicant submitted that in its judgment the court seems to have taken the view that this issue was not pleaded. The simple answer is that it should not be pleaded by a defendant. At the stage of raising a plea, a defendant does not know whether a plaintiff will commit an infraction and not lead the applicable law. The issue only arises after the case has been closed and the infraction committed.

On the contrary the respondent submitted that the applicant is improperly attempting to raise the question of jurisdiction through the back door by raising what in effect is a red-herring, by alleging that Congolese (foreign law) was relevant to the matter and should have been proved by the respondent. It said the applicant did not challenge the jurisdiction of the court in its plea meaning that the court's jurisdiction to try the case was accepted and remained undisturbed throughout the proceedings. A look at the Joint Pre-trial Conference will show that the issue of jurisdiction was never referred to the court for determination. Hence the respondent did not rely on Congolese law to prove its claims but on Zimbabwean law. It further averred that absent challenge to its jurisdiction the court was entitled to apply the jurisprudence applicable in Zimbabwe. (c/f *Lane and Anor NNO* v *Dabelstein and Others* (*Lane* and *Another NNO Intervening*) 1999 (3) SA 150 (C) at 171-172. The court there said:

> "The applicants as German creditors, have chosen to make use of this Court and have in fact submitted to its jurisdiction and to the applicable South African law, as appears from the indemnity furnished by them."

While in the present matter the applicant came before court initially by way of an ex parte application for an order of attachment to found jurisdiction brought by the respondent that order was served upon it as well as the summons in the Congo. It answered to the call and submitted to the jurisdiction of the High Court of Zimbabwe. *Ipso facto* the same reasoning applies. The duty to place the foreign law relied upon before the court rests with the party relying on it. see *Caterham Car Sales & Coachworks Ltd* 1998 (3) SA 938 (SCA). Because the respondent was and is not relying on the foreign law it had no duty to prove that the law of the DRC is applicable in this case.

A reading of my judgment HH 390/21 will show that this was never an issue before the court, and it was never pleaded save for the plea of prescription that the laws of the Democratic Republic of Congo applied to the question of applicant's liability for respondent's claims. It was not pleaded, but my judgment dealt with this issue. The applicant may be dissatisfied by my findings but the bottom line is that I dealt with this issue. As has been submitted by the respondent herein, the main matter commenced by way of summons which were accompanied by a declaration by the plaintiff, respondent herein. This action, respondent was able to institute after obtaining a judgment against the applicant in an application for attachment of applicant's goods transiting through Zimbabwe for export. The attachment was necessary to found jurisdiction so that the High Court of Zimbabwe could determine the matter. The Honourable High Court, per MAFUSIRE J,

granted the order of attachment to found jurisdiction in Case No. HC 10736/14. The order remains extant.

It must be remembered that this court was dealing with an application for absolution from the instance and not a final judgment, hence this Court in my view properly applied the principles applicable in an application of this nature, thereby found that the respondent had at least established a *prima facie* case warranting the placing of the applicant on its defence. On this point the applicant's appeal cannot succeed.

3. The other grounds of appeal which I found baseless is that the court a quo erred in placing appellant on its defence without making a finding as to whether at law, employees engaged in an unlawful and riotous collective job action can be said to be acting within the course and scope of their employment with the result that vicarious liability attaches to the employer for the actions of such employees.
   - That the court erred in concluding that there was breach of the duty of care,
   - that cause of action relied upon by respondent arose in the year 2010 and the proceedings were brought in the year 2015 court erred in saying there was no prescription.
   - That the court erred in concluding that there was before it evidence of damages which required to be rebutted.

My simple explanation is that this Court delivered its judgment after correctly applying the legal test for deciding upon an application for absolution from the instance, see pages 4-5 of my cyclostyled judgment. The leading authority on the subject in Zimbabwe which has been followed by Courts in a long line of precedents is *Supreme Service Station 1969 Private Ltd* v *Fox & Goodridge* (Pvt) Ltd 1971 (4) SA 90 (RA). Having applied the correct principle, this Court dismissed the application for absolution. Implicit in the decision is the finding that the respondent had established a *prima facie* case which the applicant was called upon to answer. Implicit in the dismissal of the application for absolution was a finding that the claims had not prescribed. There was evidence led for the respondent that between 2010 and 2015 the respondent made indefatigable efforts to assert its rights under the laws of DRC including instituting litigation. Further, that on assurance of settlement if it withdrew litigation proceedings. The applicant was prepared to negotiate settlement out of Court, all of which came to naught. Whatever action proceedings

respondent took to assert its legal rights thereat would have operated to interrupt the running of prescription under Zimbabwean law. *Prima facie* therefore respondent had proved that it had instituted legal action within the fixed limitations. Furthermore, implicit in the court's judgment (p 5 last para) is a finding of negligence alternatively that applicant owed a duty of care to the respondent to prevent or avert the harm that respondent suffered through the direct arson of its trucks in terms of their value and consequent damages caused by the loss of those trucks in terms of inability to carry on its trucking business. Further, that the applicant failed to take any reasonable measures to prevent or avert the harm. Accordingly, it is clear that the court was satisfied that the delict alleged under the Acquilian action alternatively, under the duty of care doctrine was prima facie established by the respondent. It being an issue of damages, at this stage the court was not expected to give an exact amount of damages as the court was to do an assessment after the close of applicant's case and in the event of applicant being found liable.

In the final analysis this court is of the view that this application has no merit and has been mounted for the sake of delaying the finalization of the matter. Considering that this is applicant's second application for leave to appeal against the refusal to grant absolution from the instance on the same matter, it is clear that the interest of justice is not served by the grant of second leave to appeal. As was correctly submitted by the respondent:

> "The upshot of what the applicant seeks to achieve is an indefinite postponement of the day of reckoning. The dispute has been dragging on for over a decade. Delays in bringing matters to finality within a reasonable time inevitably compromise and or bring the administration of justice into disrepute and lead to loss of public confidence in the justice system. There must be finality to litigation. Both parties deserve it, the public desires it and the Courts are better served by it as they have many other litigants to attend to. It is intrinsically undesirable that a judge should be seized with a matter for an indeterminate period of time. On this basis alone, it is respectfully submitted that the application should be refused."

In the event that leave to appeal is granted and the appeal fails in the Supreme Court, it will require this Honourable Court to continue the trial. In the event that the respondent's claims succeed at the end of trial Applicant may still appeal. In the event that the present application fails the applicant may still approach a judge of the Supreme Court for leave to appeal. That may or may not be granted. The applicant has been placed on its defence in the trial. The legal issues raised by it have to be underpinned by substance not points raised in vacuo. Though understandable on the basis that perhaps it is but "a straw at which a drowning man may be expected to grasp", to borrow the words of STEGMANN J in *Savage and Lovemore Mining (PTY) Ltd* v *International*

Shipping Co. (PTY) LTD 1987 (2) SA 149(W), that alone cannot be a reason to entertain the applicant.

On the basis of the afore-going the applicant does not have an arguable case and has on balance no reasonable prospects of success on appeal against this court's ruling refusing absolution from the instance. Leave to appeal must therefore be dismissed.

IT IS ORDERED THAT:

1. The application is dismissed.
2. The Applicant be and is hereby ordered to pay costs on an ordinary scale.

TAGU J…….

Dube Manikai & Hwacha, applicant's legal practitioners
Machaya & Associates, respondent's legal practitioners