SIKONA FARM (PRIVATE) LIMITED
and
GIRDLESTONE ENGINEERING (PRIVATE) LIMITED
Versus
CAREY FARM PRIVATE LIMITED
and
NEWTON MADZIKA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 24 March 2014

Chamber Application-Leave to Appeal

M.E. Motsi, for 1st and 2nd applicants
W.T Manase, for 1st respondent
A.Mambosasa, for 2nd respondent

CHIGUMBA J: The applicants filed a chamber application for leave to appeal to the Supreme Court, on 6 February 2014, in which the following order is sought:

IT IS ORDERED

1. The applicants be and are hereby granted leave to appeal to the Supreme Court against the order granted on the 24th of January 2014.
2. That applicants file their appeal within ten days of the date of this order.
3. The 1st respondent pays costs of suit should it oppose.

The chamber application was supported by a founding affidavit which was deposed to by Mr. Anthony John Lane Manning, the managing director of the first applicant, who averred that, the first respondent filed an application for rescission of default judgment on 27 November 2013 under case number HC 10178/13. The first applicant averred further, that, this application was purportedly filed on behalf of the first respondent Carey Farm, by Messrs Manase & Manase, who were not the first respondent's legal practitioners of record at the time. The applicants

opposed the application for rescission of judgment on 12 December 2013. It is alleged that, on 18 December 2013, the first respondent attempted to smuggle its application for rescission of judgment onto the unopposed roll, where it was struck off, and referred to the opposed roll, because it was opposed.

The applicants averred that, on 20 December 2013, the first respondent filed a chamber application in terms of Order 32 rr 226(2) and rr 233 of the rules of this court, seeking to strike out the notice of opposition under case number HC10178/13. The applicants allege that they opposed the chamber application of 20 December 2013, and that they filed a notice of opposition to it, of record on 17 January 2014 in which they raised the following points:

(a) Messrs Mambosasa Legal Practitioners were still to renounce agency as attorneys of record for the 1st respondent Carey Farm, and Messrs Manase and Manase had not assumed agency, and ought to comply with Order 2 rr 5 of the rules of this court.
(b) An application to strike out should be in terms of Order 21 rr 138 of the rules of this court
(c) Messrs Mambosasa legal Practitioners were still part of the record of case number HC9801/12.
(d) The 1st respondent's legal recourse should be against the second respondent and Messrs Mambosasa legal practitioners.

The applicants allege that they were surprised to be served with the order granted in chambers by myself on 24 January 2014, which order was served on them, on 29 January 2014. The applicants aver that it is their wish to appeal against that judgment, in its entirety, for the reason that, another court, furnished with the same facts, would have come to a different conclusion, and that applicants' appeal has bright prospects of success. The applicants aver that they will suffer prejudice if leave to appeal is not granted. The proposed grounds of appeal are that:

1. The learnered judge erred in granting an ordinary chamber application filed in terms of Order 32 seeking to strike out a notice of opposition when it should have been filed in terms of Order 21 rr 138 of the High court Rules 1971.
2. The learnered judge erred in granting an application by Messrs Manase & Manase who are yet to assume agency and ignored the fact that Messrs Mambosasa legal practitioners have not renounced agency as required by Order 2 rule 5 of the High Court rules 1971.

3. The learnered judge erred in failing to realize that the first respondent's legal recourse if any lies against the second respondent and Messrs Mambosasa legal practitioners.

The applicants attached to their papers, a notice of entry of appearance to defend filed of record by Messrs Mambosasa legal practitioners, dated 11 September 2012, in which notice is given that that the first and second defendant, the first and second respondent herein, had entered appearance to defend the action under case number HC 9801/12, and that their address for service was care of their undersigned legal practitioners, Messrs Mambosasa legal practitioners. The applicants also attached an exception filed by the respondents, on 28 December 2012, in which Messrs Mambosasa legal practitioners were the respondent's legal practitioners of record.

1st respondent opposed the application for leave to appeal, on 10 February 2014, through the auspices of Messrs Manase and Manase, by filing an affidavit deposed to by Edmore Edward Sithole, who stated in paragraph 3 thereof that:

> "1st respondent has always insisted that it is represented by Messrs Manase & Manase and has NEVER instructed Messrs Mambosasa legal practitioners".

The first respondent denied that it ever authorized Messrs Mambosasa to represent it, and that accordingly, there was no need for renunciation or assumption of agency. 1st respondent averred further, that any act done by an agent who had no authority from the principal to so act is void *ab initio.* The first respondent averred that Messrs Mambosasa erroneously assumed agency on its behalf and that accordingly, any acts purportedly done on its behalf by Messrs Mambosasa in this matter are void *ab initio.* The first respondent attached a notice of withdrawal dated 28 November 2013, in which Messrs Mambosasa legal practitioners withdrew the exception filed of record, on the basis that, as legal practitioners of the first defendant, Mr. Newton Madzika, they erroneously and wrongly filed the exception on behalf of the second defendant (1st respondent herein), and that they "…erroneously assumed agency on behalf of the second defendant". In the notice, the first defendant Mr. Newton Madzika, undertook to bear the wasted costs of the exception.

In regards to the merits of the application for leave to appeal, the first respondent submitted that the application had no prospects of success, because the applicant had not shown how the court misdirected itself when it exercised its discretion and granted the relief sought in

terms of Order 32. The first respondent submitted that the appeal is frivolous and vexatious, and has no prospect of success. The first respondent denied that the dismissal of the application would prejudice the applicants in any way. The applicants filed an answering affidavit, in which they insisted that Messrs Mambosasa are the first respondent's legal practitioners of record, and insisted that the first respondent ought to have proceeded in terms of order 21 rr 138 of the rules of this court which provides as follows:

> "***138. Procedure on filing special plea, exception or application to strike out***
> When a special plea, exception or application to strike out has been filed—
>
> (*a*) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
> (*b*) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
> (*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.

Order 21 rr137, where it relates to applications to strike out, stipulates that:

> ***137. Alternatives to pleading to merits: forms***
> (1) A party may—
> (*a*)…
> (*b*) …
> (*c*) apply to strike out any paragraphs of the pleading which should properly be struck out; set down for hearing in accordance with sub rule (2) of rule 223;

In my view Order 21 is designed to provide alternatives to pleading to merits in action proceedings, and the application to strike out referred to in Order 21 rr 137(1) (c) refers to an application to strike out offending paragraphs of a summons or a declaration. According to Herbstein & Van Winsen *Civil Practice of the Superior Courts in South Africa*, 2nd ed, at pp 314-315:

> "The true object of an exception is either, if possible to settle the case, or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception".

It has been held in the case of *Tobacco Sales producers (Pvt) Ltd* v *Eternity Star*

Investments 2006 (2) ZLR 293, that:

> "…an exception can only be properly filed before the excipient pleads to the merits of the matter…it is an alternative to pleading to the merits. Once the excipient pleads before filing the exception he is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing…after the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action".

Rule 223 of the rules of this court provides that applications in which no notice of opposition have been filed may be set down for determination on the unopposed roll. It does not provide for the striking out of opposing papers that are in contravention of the rules. This supports my firmly held view that 1st respondent properly proceeded to apply in terms of Order 32, which provides, in the application procedure, for the striking out of the applicant's defective opposing papers, in an application for rescission of judgment.

Application for leave to appeal to the Supreme Court is provided for by s 43 of the High Court Act [*Cap 7:06*] as read with Order34 rr 263-269 of the rules of this court. The relevant part of section 43, i.e. s 43(2)(d), provides that:

> "**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—
> (*a*) …
> (*b*) …
> (*c*) from—
> (i) …
> (ii)
> (*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) …
> (ii) …
> (iii) …
> (3)

Herbstein & van Winsen Civil Practice of the Supreme Court of South Africa 4 ed p 877 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. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect."

In *Jesse* v *Chioza 1996 (1) ZLR 341 (S), H 1998 (1) ZLR p4*, it was held that;

"…``a ruling" is not appealable even with leave."

In an application for leave to appeal such as in the circumstances of this case, the court must consider the distinction between ``rulings" and ``simple interlocutory orders, and consider the rationale behind the restriction of the right of appeal. In *Pretoria Garrison Institutes* v *Danish Variety Products* 1948 (1) SA 839 (A) at 867 the learned Judge of Appeal discussed the rationale of the rule requiring leave in appeals against interlocutory judgments. He said:

``Where a hierarchy of courts exists it is perhaps natural to regard what we are accustomed to call the right of appeal from any order whatsoever made by a lower court as, to some extent, a refusal of justice. Under an ideal system, it might be expected that whatever error an inferior court has committed will be promptly corrected by a higher court, and so on, until the highest tribunal in the pyramid has pronounced on the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics.

This latter consideration has, I imagine, been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle. The chief object has naturally been to bring about a just and expeditious decision of a major substantive dispute between the parties. …But desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable."

Order 34 rr 263 provides that application for leave to appeal be made only in special circumstances, where the appeal is intended to be made against an interlocutory order. Clearly,

applicants do not dispute that the order granted on 24 January 2014 is interlocutory, that is why leave to appeal is being sought. The application for leave to appeal however is defective for failing to make the essential averments required in regards to the special circumstances that ought to exist before such an application is made, and consideration of which should influence the court to accede to the application for leave to appeal. It is my view that, had the applicants submitted and made averments that the matter proceeded by way of chamber application, in which their side was not placed before the court for consideration, that averment would have qualified as a special circumstance entitling the applicants to challenge the order granted on 24 January 2024, on appeal, despite the fact that it was an interlocutory order. Unfortunately, no such averment was made.

When regard is had to the proposed grounds of appeal, the first ground can be disposed of by the finding that Order 21 relates to the action procedure, and is designed as an alternative to pleading to merits where summons has been issued, so it was proper for the first respondent to resort to Order 32, which governs the application procedure, in seeking the relief that was granted to it by the court. The second and the third grounds of appeal relate to the question of who the correct legal practitioners of record are, for the first respondent, between Messrs Mambosasa and Messrs Manase and Manase. In my view this issue does not raise points of law, but of fact. Clearly Messrs Mambosasa indicated that they erroneously and wrongly entered appearance to defend on behalf of the first respondent, and withdrew the purported notice , with the second respondent herein tendering wasted costs. The withdrawal of the exception, and of the appearance to defend wrongly filed on the first respondent's behalf, was filed properly in terms of the rules of this court, and no suggestion has been made that the withdrawal is defective, or contrary to the rules. The first respondent has deposed to an affidavit that it never instructed Messrs Mambosasa to represent it. All this evidence is before me, in this application. How then can it be found that the applicant is likely to succeed on the last two grounds of appeal, when the evidence is clear that, as a matter of fact, the first respondent never instructed Messrs Mambosasa to represent it, and Messrs Mambosasa themselves have in effect confessed that they were not instructed to act on behalf of the first respondent?

The effect of failing to assume or renounce agency when the rules of this court require one to do so, is to bring into question the issue of the right to be heard on behalf of your alleged

client. Where a legal practitioner who had no right to be heard has been heard, deliberately and intentionally in contravention of Order 2 rr5, the remedy is to report the legal practitioner to the Law Society for violations of the Legal Practitioners Act [*Cap27:07*], and of the rules of ethics, and or to cause disciplinary proceedings to be instituted. The legal practitioner's lack of right of audience, after audience has already been given, cannot be used as a sword in an appeal, as a ground for overturning judgment, unless the complaint emanated from the client which was wrongly represented, which is not the case in *casu*.

In my view, none of the grounds of appeal have any merit. The point of law is ill conceived. The points of facts have been shown to be factually incorrect. In my view the order of 24 January 2014, being interlocutory and procedural and not definitive of the rights of the parties, ought not to proceed on appeal, for a resolution of the appeal will not bring the parties any closer to a resolution of the dispute in the main mater The application for leave to appeal must fail for this reason and because it is defective, it does not contain any averments on special circumstances as required in terms of Order 34 rr 263, and that, it has absolutely no prospects of success, on the merits.

Messrs M.E.Motsi & Associates,applicans' legal practitioners
Messrs Manase & Manase, 1st respondent's legal practitioners
Mambosasa legal practitioners, 2nd respondent legal practitioners