**REPORTABLE (133 )**

**SIBANGANI MZIZI**
**v**
**(1) EFFIE DEWA (2) GIVEN NYATHI (3) SIBONGILE GANDIYE (4) THE REGISTRAR OF DEEDS N.O**

**SUPREME COURT OF ZIMBABWE**
**BULAWAYO, 21 OCTOBER 2021 & 8 NOVEMBER 2021**

*N. Mazibuko*, for the applicant

*S. Siziba*, for the first respondent

The second respondent in default

*Z. Ncube*, for the respondent

**IN CHAMBERS**

**MATHONSI JA:** In response to a summons action instituted by the first respondent against him and three others, for a declaratory order and a reversal of the transfer of Stand 4458 Bulawayo Township, the applicant filed an exception and special plea.

In the exception, the applicant averred that the summons and declaration did not disclose a cause of action. In the special plea, the applicant made the averment that the first respondent's claim is prescribed and no longer actionable, the cause of action having arisen in 2007. The summons was issued on 29 May 2017 and served on the applicant thereafter.

In a judgment delivered on 19 August 2021, the High Court dismissed both the exception and special plea with costs setting the stage for the commencement of the trial. The applicant is aggrieved and intends to appeal against that judgment. Being out of time to lodge an appeal, the applicant has made this application for condonation and extension of time within which to appeal. The application is made in terms of r 43 (1) of the Supreme Court Rules, 2018.

**THE FACTS**

The applicant and the second respondent are wife and husband respectively. Both are said to be fugitives from justice. They entered into a swap agreement with the first respondent in terms of which they agreed to give the first respondent a restaurant registered in the name of a company known as Richdena Investments (Pvt) Ltd.

In exchange, the first respondent would surrender to the two, her stand 4458 Bulawayo Township of Bulawayo also known as house number 12 Cromartu Road Queens Park East Bulawayo (the house). The agreement was entered into on 24 August 2007. In pursuance thereof, the first respondent surrendered her ownership documents to the applicant and the second respondent to facilitate transfer of the house to them.

Upon requesting the applicant and the second respondent to honour their part of the bargain by submitting the restaurant documents to her, the first respondent's problems started. They refused. She later discovered that they had no rights in the restaurants. Meanwhile, on 28 August 2007 they forged the first respondent's signature on a Power of Attorney to pass transfer of the house without her knowledge. When she made the discovery, the first respondent reported a case of fraud and/or forgery.

The police commenced investigations which later revealed that indeed the first respondent's signature had been forged. Before this happened in May 2013, the applicant and her husband sold the house to the third respondent who paid them the full purchase price. The third respondent took transfer of the house but the applicant and her husband had already absconded.

On 29 May 2017, the first respondent issued out a summons in the High Court seeking an order declaring the transfer of the house from her illegal. She also sought an order reversing all subsequent transfers and a restoration of her title to the house. As I have said, the applicant responded by filing an exception and special plea to the claim.

In her exception the applicant averred that the summons and declaration did not disclose a cause of action in that the first respondent never cancelled the agreement between the parties. In the absence of a cancellation, the first respondent had no right to sue as she did. Regarding the special plea, the applicant's case was that the first respondent's cause of action arose in 2007 at which time prescription started running. By the time the action commenced in 2017 the claim had prescribed.

The applicant set the matter down on the court roll for opposed matters. It is common cause that no *viva voce* evidence on either the exception or special plea was led at the hearing. The High Court found no merit in both exception and special plea which it dismissed with costs in a judgment handed down on 19 August 2021.

The applicant attempted to lodge her appeal on 17 September 2017 but by then she was a day out of time. Accordingly, she has brought this application for condonation and extension of time within which to appeal. The applicant's legal practitioner has accepted responsibility for the failure to comply with the rules in an affidavit filed in support of the application.

He stated that he miscalculated the time within he was allowed to appeal resulting in the failure to file the appeal timeously. He insists that the proposed appeal enjoys prospects of success.

In opposing the application, the first respondent took a preliminary point that the application is defective by reason that the applicant intends to appeal against an interlocutory decision of the High Court without first seeking leave to appeal.

**SUBMISSIONS OF THE PARTIES**

Having had sight of the first respondent's preliminary objection to the application, Mr *Mazibuko* for the applicant was quick to concede that the point taken *in limine* on the need to seek the leave of the High Court to appeal against the decision dismissing the exception was well taken. He promptly abandoned his intention to appeal against the dismissal of the exception but persisted with the desire to appeal the decision dismissing the special plea of prescription without leave.

Mr *Siziba* for the first respondent submitted that even the decision dismissing the special plea is interlocutory in nature. Accordingly, the applicant can only appeal against it with the leave of the court which made the decision in terms s 43 (2) (d) of the High Court

Act [*Chapter 7:06*]. That section makes it clear, so it was argued that no appeal shall lie against an interlocutory judgment without the leave of the court.

Mr *Siziba* took the view that there is no distinction between an exception and a special plea as they both are interlocutory in nature and fall within the remit of s 43 (2) (d) of the Act. He relied on the authority of *Blue Rangers Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368 (S) on what an interlocutory order is.

Mr *Ncube* who appeared for the third respondent submitted that having not filed any opposition *a quo*, his was merely a watching brief. He would abide by the decision of the court.

In response to the point *in limine*, Mr *Mazibuko* submitted that the applicant does not need the leave of the judge who made the decision sought to be appealed because the decision is final in nature. It takes away entirely the applicant's defence of prescription to such an extent that going forward, the defence will no longer be available to the applicant.

**ANALYSIS**

In terms of s 43 (2) (d) of the High Court Act:

> "(2) No appeal shall lie-
> (a) ……
> (b) ……
> (c) ……
> (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."

What constitutes an interlocutory order or judgment is not defined in the Act. Writing *obiter dictum* in *Blue Rangers Estates (Pvt) Ltd*, supra, at pp 376E – G, MALABA DCJ (as he then was) stated:

> "I have decided to express my views on the question whether the order made by the learned judge is an interlocutory order not appealable in terms of s 43 (2) (d) of the High Court Act without the leave of the judge who made it.
> 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 at 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 of 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 issue or cause of action between the parties."

In my view, a convenient test is to look at whether "the final word" has been spoken on the point in issue. Put in another way one considers whether the order is reparable at the final hearing. See *Blaauwbosch Diamonds Ltd v Union Government* (*Minister of Finance*) 1915 AD 599 at 601.

In respect of both an exception and a special plea, the effect of refusing the plea is merely a refusal by the court to set aside the summons and declaration. The case however continues to trial where the applicant may elect to re-argue the same points. This is particularly so in this case where no evidence was taken by the High Court on the substance of the special plea of prescription.

The judgment of *Van Brooker v Mudhara & Anor and Pieree V Mudhara & Anor* SC 5/18 cited by Mr *Mazibuko*, is authority for the need to lead evidence before determining a special plea. There is nothing precluding the applicant from leading evidence at the trial to prove her special plea. It means that the final word on that issue has not been said as the trial court may still be persuaded to find in the applicant's favour. I conclude therefore

that the judgment of the High Court dismissing the special plea is interlocutory in nature even though it may appear final in form.

Even if I were wrong in arriving at that conclusion, I would still not countenance the application for condonation where no leave has been sought for yet another reason. It is that these are unterminated proceedings in the High Court where that court is still seized with all the issues and the cause of action.

This court is always slow to interfere with unterminated proceedings of a lower court except in rare instances of a glaring injustice. This case is not one such case. The High Court must be allowed to complete these proceedings before an appeal court is engaged on the dispute between the parties.

The rationale behind that approach is that it is clearly undesirable and indeed clumsy for parties to skip up and down between two different courts in the middle of proceedings in the lower court. Such a state of affairs not only breeds uncertainty in the administration of justice but tends to bring the administration of justice into disrepute.

**DISPOSITION**

The High Court handed down an interlocutory judgment dismissing the applicant's special plea. It is still seized with the matter and should be allowed to complete the proceedings. The provisions of s 43 (2) (d) for leave to be sought and granted before one can appeal such an interlocutory judgment allow that court to consider the merits of the proposed appeal. It is only after due consideration that the court seized with the matter may grant or refuse leave.

The applicant's intended appeal cannot be made without leave being granted first. The application is therefore improperly before me. Regarding costs, I see no reason, and none has been suggested, why those should not follow the result. However, I am of the view that no case has been made for the first respondent's prayer for costs on the scale of legal practitioner and client scale.

In the result, it be and is hereby ordered as follows:

1. The application is struck off the roll.
2. The applicant shall bear the costs.

*Calderwood, Bryce Hendrie & Partners*, applicant's legal practitioners.

*Ndove & Associates*, 1st respondent's legal practitioners.

*Ncube & Partners*, 3rd respondent's legal practitioners