HB 224-16
HC 1951-16
XREF HC 2700-14
XREF HC 2502-15
XREF HC 694-16

ELLIOT NCUBE
versus
REVEREND CLEMENT NYATHI
and
REVEREND JOSEPH MATONGO
and
REVEREND ABEL HELE MEPHULANGOGALA
and
REVEREND PHIBION TAGARIRA MANYOWA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 AUGUST 2016 AND 18 AUGUST 2016

Urgent Chamber Application

T Masiye-Moyo for the applicant
T Magwaliba for the 1st, 2nd, 3rd and 4th respondents

MATHONSI J: There has been a split in the Apostolic Faith Mission of Africa church (the church), a voluntary religious organization governed by a constitution, which is not cited in this application but features prominently in the dispute involving the parties, in terms of which two very distinct factions have emerged. One faction is led by the applicant, Elliot Ncube and the late Tony Tshuma who passed away at the end of May 2016, may his soul rest in eternal peace. The other faction is led by the first respondent with the second, third and fourth respondents on tow and they have constituted themselves as a board of trustees of the church.

In turns out however that the applicant's faction currently controls most of the church property strewn all over the country including places of worship, which property the

respondents' faction understandably covets. It is that scenario which has set the stage for a bruising legal battle for the control of the church pitting the two factions wherein there has been one court action after the other in both this court and the Supreme Court.
In this court alone a dozen applications have been filed by either the current parties or those associated with them in their respective factions. This urgent application for a stay of execution pending the determination of two Supreme Court appeals in SC 351/15 and SC 389/15 is the twelveth application between the factions.

Let me attempt to briefly trace the history of the litigation between the parties. In HC 1735/14 the late Tony Tshuma and the church approached this court by urgent application and obtained a provisional order against the first and second respondents herein and one Reverend James Fidelis Morris on 1 August 2014 in terms of which the first respondent was interdicted from acting as or purporting to be the President and overseer of the church and the respondents were interdicted from interfering in any manner whatsoever whether directly or indirectly with the operations of the church and Tshuma's discharge of his duties as the President and overseer of the church.

It appears that the court order in question remains extant to this day. It has neither been discharged nor confirmed. While the court order in question was in subsistence, a court application was filed on 7 November 2014 in HC 2700/14 purported by Nyathi, his three other colleagues and the same church which was an applicant in HC 1735/14, against Tshuma and Ncube. The founding affidavit was deposed to by Nyathi as first applicant but he was not cited in the application at all and there was no first applicant. Clearly therefore the application was extremely defective.

On 28 November 2014 a notice of intention to amend the application was filed. It reads in part:

> "Take notice that applicants intend to amend their application (citation) by addition of Rev. Clement Nyathi as 1st applicant."

It is doubtful whether a party not cited in a court process could be added in the course of proceedings in which such party was not cited at the time the process was issued: *Gariya Safaris*

(Pvt) Ltd v *Van Wyk* 1996 (2) ZLR 246 (H); *JDM Agro-Consult and Marketing (Pvt) Ltd* v *Editor, The Herald and Another* 2007 (2) ZLR 71 (H) 75B-G, 76A; *Old Mutual Asset Management (Pvt) Ltd* v *F & R Travel Tours & Car Sales* HH 53/07. That however is not the subject of the present inquiry.

What is significant is that nowhere in the record was the intention to amend ever implemented. The court never granted the amendment but HC 2700/14 sailed through to the end without the first applicant and supported by an affidavit deposed to by a person who was in actual fact not a party to it. The supporting affidavits by the other applicants could scarcely cure the defect.

Although an attempt to oppose the application was made by Tshuma and Ncube HC 2700/14 was set down on the unopposed roll in terms of an order issued by TAKUVA J in a judgment delivered on 28 May 2015 (HB 105/15). It was set down on the unopposed roll on 11 June 2015 before MOYO J who granted default judgment in the following:

> "IT IS ORDERED THAT:
>
> 1. The 1st and 2nd respondents as well as their agents be and are hereby interdicted from interfering, visiting and or using the 6th applicant's properties wherever situate without the express authority and or consent from the applicants.
> 2. The 1st and 2nd respondents as well as their agents are barred from presenting or purporting to act as the 6th applicant either to the 6th applicant's members or to the members of the public.
> 3. The 1st and 2nd respondents and their agents are ordered to release and return the control of the 6th applicant's properties wherever situate to the applicants and to surrender the 6th applicant's affairs and activities to the applicants forthwith. The 6th applicant's properties shall include but not limited to those listed on the order granted by this court on HC 2166/14.
> 4. The 1st and 2nd respondents are ordered to pay costs of suit on a client-attorney scale."

This, despite the existence of another order of this court allowing Tshuma to run the church. The applicant and Tshuma noted an appeal to the Supreme Court on 25 June 2015 in SC 351/15 against that judgment. That appeal is still pending. I have not had sight of the record in HC 1552/15 and therefore I have been unable to verify what is in it but *Mr Magwaliba* who

appeared for the respondents submitted that it is an application for rescission of judgment filed by Tshuma and Ncube on 15 June 2015 which has not been finalized. *Mr Masiye-Moyo* for the applicants did not address me on that issue.

In HC 1669/15 the present respondents made an urgent chamber application which was filed on 27 June 2015 seeking a provisional order the interim relief of which was in the following:

"IT IS ORDERED THAT

1. The 1st and 2nd respondents and their agents be and are hereby ordered to vacate and hand over control of all the premises for the applicants which they took over on the 25th of June 2015 and anytime thereafter.
2. The 1st and 2nd respondents' purported notice of appeal on SC 315/15 (sic) dated 25th of June 2015 and the accompanying letter of the 3rd respondent (be) ignored and the 4th respondent is ordered to proceed and enforce the effect of the order on HC 2700/14 without further notice and the Zimbabwe Republic Police is ordered to assist the 4th respondent in executing the said order.
3. The applicants be and are hereby allowed to execute the order on HC 2700/14 regardless of the purported Supreme Court appeal by the 1st and 2nd respondents on SC 315/15 (sic)."

The interim relief that was sought is verbose and pedantic but in essence they were complaining that the respondents in that matter had abused the process of the court by noting an appeal against a default judgment. The appeal was a scheme of "tricks to obstruct the course of justice in the enforcement of the order on HC 2700/14," as no appeal lies against a default judgment. Accordingly they craved leave to execute pending appeal.

The matter was heard by MAKONESE J on 30 June 2015 as an urgent application and he delivered judgment on 9 July 2015 (HB 143/15). In that judgment the learned judge did not explain why a final order was issued when the applicants in that matter had prayed for provisional relief. What is clear though is that he rejected the contention that a default judgment cannot be appealed against in favour of the exercise of a discretion to grant leave to execute pending appeal because he had not been favoured with the notice of appeal to assess whether the appeal was valid and meritorious.

The learned Judge stated:

"While it is noted that an appeal has been noted under case number SC 351/15, I cannot ignore the clear position that what is essentially being challenged is an order granted in default. The applicants referred me to the case of *Zesa Pension Staff Fund* v *Mushambadzi* 2002 (2) ZLR 205, as authority that no appeal may be brought against a default judgment. I have examined that case but that case does not deal with that aspect of the law. The other matter referred to me by respondent's legal practitioners is also not of any assistance to this court ---. The filing of the appeal made at the eleventh hour is meant to delay the day of reckoning. There has been no attempt by respondents to convince the court that a valid notice of appeal has been filed in the Supreme Court. The notice and grounds of appeal are not before this court. The respondents had ample time to file supporting documents to prove that such an appeal is pending. This court cannot ascertain whether a genuine and meritorious appeal has been noted against the order sought to be enforced. The respondents have not been candid with the court. It seems that the respondents will stop at nothing to prevent the enforcement of any order of this court. The court does have a discretion in the matter and in the exercise of its discretion, the court will make the following order, in terms of the draft order:

1. First and second respondents and their agents be and are hereby ordered to vacate and hand over control of all the premises which applicants took control of on 25 June 2015.
2. The applicants be and are hereby allowed to execute the order under case number HC 2700/14 pending the purported appeal under case (number) SC 351/15.
3. Fourth respondent is ordered to proceed and enforce the terms of the order under case number HC 2700/14 and if necessary to secure the assistance of the Zimbabwe Republic Police to give effect to the order.
4. The first and second respondents are ordered to pay costs of suit."

Clearly the learned Judge was incapacitated by the absence of the notice of appeal which had not been placed before him when the urgent application was filed. That appeal, which is now in the record, was filed on 25 June 2015 and it challenged the validity of the court application in HC 2700/14 on the grounds *inter alia* that the founding affidavit carrying it was deposed to by a person who was not cited as a party and was therefore not supported by affidavit.

I am not sure whether the learned Judge would have held the same view had he had sight of the notice of appeal but where parties elect to approach the court on an urgent basis there is always the danger that there may be insufficient time to place all the useful evidence before the court in the hassle and tumble of rushing to court on short notice. It is for that reason perhaps

that the framers of the rules provided for the grant of interim relief to afford the respondents in an urgent application the opportunity to oppose the confirmation of that relief and even anticipate the provisional order.

Speaking of an appeal against a default judgment the case of *Zesa Staff Pension Fund* v *Mushambadzi, supra*, cited by the respondents is not authority for saying the appeal in SC 351/15 is invalid as it is an appeal against a default judgment. I am in total agreement with my brother MAKONESE J that the judgment of ZIYAMBI JA is not authority for the proposition that a default judgment cannot be appealed against. Quite to the contrary it is authority for the fact that this court has a discretion to stay execution of its orders when regulating its processes. At 207C –F the learned Appeal Judge said:

> "In the first place, no cause of action was established in the court *a quo*. The appellant, having obtained judgment against the respondent, was entitled to execute its judgment. While the High Court does have the power to regulate its own process and stay execution in certain cases, this is usually done pending determination of an application for rescission of the judgment concerned or the happening of some event such as the hearing of an appeal, the bringing of interpleader suit and so on. See *Civil Practice of the Supreme Court of South Africa* 4th edition by Van Winsen Cillers and Loots at pp 804 and 807. In the present case, no application for rescission was pending and the grant of the final order would effectively amount to a permanent denial of the appellant's right to execute its judgment. Further, the stay of execution is discretionary and is granted only where real and substantial justice requires such a stay or where injustice would otherwise result. In the present case, the requirements of justice do not dictate that there should be a stay of execution. If anything, an injustice is likely to result if the appellant is not allowed to execute his judgment."

In my view that case is also not an authority for the proposition made by *Mr Magwaliba* that in an application for a stay of execution the applicant does not seek an interdict against the respondent.

Mr Magwaliba however referred to the case of *Zvinavashe* v *Ndlovu* 2006 (2) ZLR 372 (S) in pursuing the point that an appeal could not be lodged against a default judgment. In that case the court *a quo* had, in granting default judgment proceeded to consider the merits of the matter and to give reasons. In rebuking the Judge for making a call not required of him,

GWAUNZA JA made the point that a default judgment can only be set aside following a successful application for rescission. The learned Judge of Appeal concluded at 376 C-D:

> "The absence of submissions on the merits, and the lack of the resultant reasons for judgment are characteristics of a judgment given in default. I am satisfied that the comments cannot and should not be, interpreted to mean that a default judgment in which, rightly or not, reasons for judgment are given, is appealable. As I have already made clear, reasons or no reasons, a default judgment remains that until it is set aside in the prescribed manner. This 'appeal' was in reality not properly before this court. I have made reference to 'appeal' and 'appellant' merely for convenience."

I must mention for completeness that the judgment giving leave to execute pending appeal was appealed against in SC 389/15 on the grounds *inter alia* that the court had granted a final order where an interim one had been sought and that the court had erred in holding that there was no appeal when it had been filed. Alternatively that the court erred in determining the merits or otherwise of an appeal which is before the Supreme Court.

I may add that two applications have been made by the respondents in the Supreme Court, namely SC 450/15 and SC 475/15 seeking the striking down of the applicant's appeals as frivolous. Those applications were unsuccessful and although no reasons have been made available by the Supreme Court for dismissing them it is common cause that the respondents' forays in the apex court came to naught. It is also common cause that the two appeals were set down for hearing at the Supreme Court on 25 July 2016 but had to be postponed owing to the demise of Tony Tshuma and pending the appointment of an executor of his estate.

Against that background, the respondents moved to execute the order in HC2700/14 on 3 August 2016 which action prompted the applicant to file this urgent application for stay of execution. The applicant maintains that both judgments in HC 2700/14 and HC 1669/15 have been suspended by the noting of appeals which appeals are yet to be determined. The respondents have always accepted that position which explains why they did not execute the judgment for well over a year only to attempt to do so after the postponement of the appeals. It is for the same reason that respondents had approached the Supreme Court on two occasions seeking to have the appeals dismissed but without success.

The application is strongly opposed by the respondents mainly on the basis that both appeals are defective, and should therefore not detain them from executing. Regarding the appeal against the order in HC 2700/14 the thrust of the respondents' challenge is that it is an appeal against a default judgment and is therefore a non-starter, a default judgment will remain effectual until set aside in terms of the procedure for doing so provided for in the law.

On the appeal against the judgment granting leave to execute pending appeal, the respondents' position is that the judgment in question is interlocutory in nature. For that reason leave to appeal should have been sought from the Judge who handed down the judgment before the appeal was launched. As no leave was sought and granted the purported appeal is invalid and cannot stop execution. The case of *Gillespies Monumental Works (Pvt) Ltd* v *Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) 438A is authority for the proposition that the term interlocutory refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation. Interlocutory orders are pronouncements which ordinarily would not have a final and definitive effect on the main cause. In that case SMITH J held that the order granting leave to execute the order evicting *Gillespies* did not have a final or definitive effect on the main suit and therefore in the absence of leave the noting of the appeal was invalid. See also *Jesse* v *Chioza* 1996 (1) ZLR 341 (S) 344G; *Do brock Holdings (Pvt) Ltd* v *Turner and Sons (Pvt) Ltd and Another* 2008 (2) ZLR 153(S).

Mr Magwaliba for the respondents however conceded that in granting leave to execute the Judge in HC 1669/15 went beyond that call and granted relief in paragraph 1 of the operative part of the judgment for the eviction of the respondents which relief is not contained in the order in HC 2700/14 sought to be enforced. In addition, it has not been disputed, in fact it is indisputable, that final relief was granted where provisional relief was sought.

I do not have jurisdiction to examine or review the orders made in both matters they having been made by fellow judges of the High Court enjoying the same jurisdiction as myself. At any rate those two matters are now pending on appeal in the Supreme Court and I am again not qualified to determine the merits of those appeals. What this application seeks however is for me to exercise my discretion, having regard to all the material circumstances, to stay the

execution of a judgment of this court which has been taken on appeal in the exercise of power reposed in me to regulate the process of this court.

In considering that I am mindful of the fact that in regulating the process of this court, I may stay execution in my discretion where real and substantial justice requires such a stay or where an injustice would occur. See *Zesa Staff Pension Fund, supra* at 207E.

The relevant considerations in the exercise of that discretion are that the two appeals which are before the Supreme Court have been assessed by that court on two occasions in SC 450/15 and 475/15 when the respondents escalated the fight to have the appeals obliterated from the surface of the earth. On each occasion the Supreme Court purposely refused to strike them off leaving them intact, never mind the attacks by the respondents.

From the time that leave to execute was granted on 9 July 2015 right up to 3 August 2016 the respondents did not attempt to do so. Instead they tried to have the appeals struck down, a realization that it was improper to do so in the face of the appeals. Their decision to execute only after the postponement of the hearing on 25 July 2016 was not only a departure from the norm and the understanding of the parties on the effects of the appeals but also created the urgency which brought the applicant to court. I therefore do not agree with Mr *Magwaliba* that there is self-created urgency.

Although the order in HC 2700/14 may have been granted in default, not only has that fact been previously placed before the Supreme Court urging it to strike down the appeal and the Supreme Court refused to uphold it for whatever reason, there is apparent irregularity in the manner in which that application was filed and therefore its validity is questionable. As Mr *Masiye-Moyo* submitted the validity of that order and indeed the one seeking to enforce it have been put to question. It is for the Supreme Court to pronounce itself on that issue.

In respect of the judgment granting leave to execute, it has been conceded by Mr *Magwaliba* that the court granted paragraph 1 relating to vacation of premises, which was not provided for in the order sought to be enforced. The High Court was already *functus officio; Matanhire* v *BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140(C) 146 C-D. If that is considered together with the fact that a final order instead of a provisional one was granted, it

may well be that the court over shot the runway in that matter. There is therefore substance in the submissions made by *Mr Masiye-Moyo* that leave may not have been necessary given the nature of the order made.

There is also the issue of the death of Tshuma while the appeals were pending. He died at the end of May 2016 and his executor has neither been appointed nor substituted. It is a factor which has now come to my attention and has influenced the Supreme Court to postpone the appeals. *Mr Magwaliba* submitted that s44 of the Administration of Estates Act [Chapter 6:01] relied upon by the applicant in trying to halt execution only affects the suing out of any process of execution which had not occurred at the time of death. I agree.

In *Malawusi* v *Marufu and others* 2003 (1) ZLR 151 (S) 156A SANDURA JA made it clear that the section prohibits the suing out or obtaining of a writ of execution after the death of the judgment debtor. It does not affect the process which had already been sued out or obtained before the death.

However, whichever way one looks at the matter allowing execution to continue in all the circumstances of this matter would result in an injustice. This is a matter involving the split of a major church organization. The status *quo* obtaining at the moment has subsisted for more than a year even as the court process sought to be executed existed. The basis upon which execution is sought is a default judgment which has been impugned. The follow up judgment enforcing it has also been questioned on what appear to be valid grounds. The appeal court still has to pronounce itself on those issues.

In my view this court has a duty to regulate its process in such a way as to avoid confusion and anarchy. Evictions which had already commenced in Kadoma and Victoria Falls may mean that if the appeal court upholds the appeals there would be pain and suffering for a lot of people when the process is being reversed again. What accords with fairness and justice is to allow the status *quo* to remain until the appeals are finalized. Therefore in the judicious exercise of my discretion I will stay execution.

In the result, the provisional order is hereby granted in terms of the draft order.

Messrs Gill. Godlonton and Gerrans, C/o Masiye-Moyo & Associates applicant's legal practitioners
Mugiya & Macharaga Law Chambers C/o Muzvuzvu & Mguni Law Chambers, respondents' legal practitioners