REPORTABLE ZLR(22)

Judgment No. 29/09
Civil Appeal no. 56/09

BLUE RANGERS ESTATES (PVT) LTD v (1) JAMAYA MUDUVIRI (2) THE MINISTER OF LANDS AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
HARARE, MAY 20 & JUNE 16, 2009

D Drury, for the applicant

G Mlotshwa, for the first respondent

No appearance for the second respondent

Before MALABA DCJ: In Chambers.

On 9 March 2009 the High Court made a spoliation order for the restoration of peaceful and undisturbed possession of Twyford Estate in Chegutu to the applicant at the same time directing the first respondent and all those claiming possession of the property through him to vacate the farm forthwith failing which the Deputy Sheriff be authorized to remove them. The spoliation order was issued in the form of a provisional order.

It provided as follows:

"**TERMS OF THE ORDER MADE**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The applicant's right to quiet undisturbed, possession of Twyford Estate Chegutu district as further particularized in the High Court orders annexed to this application as Annexures '2' and '3' and all movables thereon including livestock (hereinafter called "the property") be and is hereby confirmed. That it is further declared that such right shall continue to subsist until such time as the applicants -- should it become necessary or expedient - are lawfully evicted from the property through a competent order of court having final effect.

2. It be and is hereby declared that the conduct of the 2nd respondent and all other persons acting in common purpose or association with him on or about the property from the 6th February 2009 until their removal, resulting in dispossession of applicants from their property is unlawful for want of compliance with due process to obtain vacant possession of the property and accordingly constitutes an unlawful spoliation of applicants' property.

3. Respondents pay the costs of this application jointly and severally, the one paying the other to be absolved.

INTERIM RELIEF

That pending determination of this matter the applicants are granted the following relief:-

(a) It be and is hereby ordered that the *status quo ante* to applicants' possession control and occupation of Twyford Estate in the district of Chegutu prior to 2nd respondent and all other persons acting through him summarily occupying the property on the 6th February 2009 be and is hereby restored.

(b) 2nd respondent and all other persons claiming occupation and possession of the property and/or all other persons not being representatives, employees or invitees of applicants are directed to forthwith vacate the property removing all movable property that may have been introduced by them onto the property.

(c) To the extent that it becomes necessary or expedient, the Deputy Sheriff is hereby authorized and empowered to attend to the removal of the 2nd respondent and all other persons acting through him from the property so that the provisions of this order are executed and implemented in full."

It is common cause that the order made by the learned Judge in the form of interim relief is a spoliation order. On 11 March 2009 the first respondent who was the second respondent to the application, appealed to the Supreme Court against the order. The notice of appeal contained all the matters required under r 29 of the Rules of the Supreme Court 1964 ("the Rules") for a valid notice of appeal. It stated that the order from which relief was being sought was a final and definitive order.

On 22 April the applicant made an application to a single Judge of the Supreme Court sitting in chambers for an order striking the appeal off the roll on the ground that in terms of s 43(2)(d) of the High Court Act [*Cap 7:06*] ("the High Court Act"), the order made by the learned Judge was an interlocutory order in respect to which no appeal lay to the Supreme Court without the leave of the Judge who made the order or if that was refused, without the leave of a Judge of the Supreme Court. Leave of the learned Judge had not been sought before the appeal was noted. The contention was that no appeal was pending before the Supreme Court.

The first respondent opposed the application on two grounds. The first point taken *in limine* was that a single Judge of the Supreme Court sitting in chambers has no power to grant the relief sought by the applicant. The contention was that an appeal, the noting of which complied with the requirements of the rules, is pending hearing by the Supreme Court until "the Court", in the exercise of its jurisdiction, decides that in terms of the enactment creating the right of appeal no appeal lies against the order from which relief is sought.

The first respondent said that if the applicant intended to have the appeal struck off the roll it should have applied to the Supreme Court for the relief on a court application as required under r 39. It could also have raised the matter by way of a preliminary objection to the exercise by the Court of its jurisdiction to hear the appeal in terms of r 41 of the Rules.

Rule 39 provides that:

> "Subject to the provisions of rules 31, 36, 37 & 38 applications shall be by court application signed by the applicant or his legal representative and accompanied by an affidavit setting out any facts which are relied upon."

Rules 31, 36, 37 and 38 relate to matters in respect to which it is specifically provided that relief can be sought by application to a Judge of the Supreme Court sitting in chambers or open court. Striking an appeal off the roll is not one of the matters provided for under any of these rules.

Rule 41 provides that:

> "A party to an appeal who intends to rely on a preliminary objection to any proceedings or to the use of any document shall give notice in writing of the objection to the registrar and to the opposite party. If the objection is to be taken at the hearing of an appeal three copies of the notice shall be given to the registrar."

The second point taken by the first respondent on the application was on the merits. He averred that the order made by the learned Judge was a final and definitive order despite the fact that it is interlocutory in form. He said because of the nature of the

order an appeal lay to the Supreme Court in terms of s 43(1) of the High Court Act without the leave of the Judge who granted the order.

In reply to the point *in limine* the applicant contended that a Judge of the Supreme Court sitting in chambers constituted "the Court" with power to grant the relief sought. On the allegation that there was non-compliance with r 39 or r 41 the applicant said that r 4 of the Rules gives the Judge discretion to condone non-compliance with any rule of court if it is in the interest of justice to do so. The argument was that I should exercise the discretion under r 4 to condone applicant's failure to make an application to Court in terms of r 39 for the relief it sought on the application to a Judge in chambers.

The argument was that it was in the interest of justice that I hear and determine the application. A copy of an unspeaking order made by the late MUCHECHETERE JA in chambers on 26 January 1999 in *Croc Ostrich Breeders of Zimbabwe v Best of Zimbabwe Lodgers (Pvt) Ltd* SC 13-99 was produced to support the proposition that a single Judge of the Supreme Court sitting in chambers has power to grant an order striking an appeal off the roll. The order declared that the notice of appeal filed by the respondent on 20 November 1998 in the Supreme Court was invalid for want of the appellant thereto having applied for and been granted leave to appeal against the judgment of the High Court in Case No. HC 7118/98 as provided in s 43(2)(d) of the High Court Act [*Cap 7:06*].

On the second point raised by the first respondent, the applicant persisted in the contention that the order made by the learned Judge was interlocutory. In support of the contention, reference was made to decisions of the High Court in *Nyasha Chikafu v Dodhill (Pvt) Ltd & Ors* HH-41-2009 and *T Nyikadzino v John Cameron Asher & Ors* HH-36-2009. In *Chikafu* case *supra* BERE J made a spoliation order in the form of a provisional order couched in terms similar to those used in the provisional order made in this case. The applicant who was aggrieved by the order applied to the learned Judge for leave to appeal believing that the order was interlocutory. The learned Judge found as a fact that he had made a spoliation order. He held that the order was interlocutory and refused leave to appeal on the ground that there were no prospects of success on appeal.

In *Nyikadzino v John Cameron Asher supra* a spoliation order was also made in the form of a provisional order the terms of which were also similar to those used in this case. The applicant who was also aggrieved by the order appealed to the Supreme Court. The respondent nonetheless instructed the Deputy Sheriff to execute the order on the advice of its legal practitioners that the order was interlocutory and as no leave had been sought and obtained from the Judge who granted it, no appeal lay to the Supreme Court for an order staying execution of the order pending appeal.

The learned Judge President heard the opposed application. She found as a fact that the order made "was a spoliation order, simply restoring possession of the farm to the first respondent without going into the merits regarding lawfulness or otherwise of such possession". She went on to hold that a spoliation order granted in the form of an

interim relief was an interlocutory order not appealable without the leave of the Judge who made the order or if that has been refused, without the leave of a Judge of the Supreme Court. The learned Judge President dismissed the application after saying that:

> "A provisional order granted under the rules is always subject to confirmation or discharge before it becomes final. Confirmation on discharge is in open court and is on a balance of probabilities. In a provisional order, the power of the court to vary, discharge or confirm its earlier decision is re-affirmed in that it calls upon the respondent to show cause why the provisional order may not be confirmed.
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> It is because of the above attributes of a provisional order that I am of the view that orders granted by this court in the form of a provisional order, can hardly be final in their effect."

I now turn to determine the issues raised in the application. On the first point I agree with Mr *Mlotshwa* that a single Judge of the Supreme Court sitting in chambers has no power derived from any provision of the relevant statutes, to make an order striking an appeal pending in the Supreme Court off the roll. The answer to the question whether a single Judge sitting in chambers has power to hear and determine an application for an order striking an appeal off the roll lies in the relevant provisions of the Statute in terms of which the Supreme Court was created and the Rules regulating its proceedings. It is also necessary to take into account provisions of the enactments by which the right of access to the Supreme Court on appeal is given.

Section 43(1) of the High Court Act provides that subject to the exceptions specified thereunder an appeal in any civil case shall lie to the Supreme Court from any judgment (includes order) of the High Court. The right of appeal lies to the Supreme Court which is the body endowed with the power to hear and determine the appeal.

The Supreme Court was created by s 80(1) of the Constitution as a final Court of Appeal for Zimbabwe without original jurisdiction except when constituted as a Constitutional Court to hear and determine applications under s 24(1) of the Constitution alleging violation of the declaration of rights. The Supreme Court consists of the Chief Justice, the Deputy Chief Justice, such other Judges of the Supreme Court, being not less than two, as the President may deem necessary and such other Judges as have been appointed acting Judges of the Supreme Court.

As a Court of appeal the jurisdiction of the Supreme Court exercised by the Judges of whom it consists is to hear and determine appeals which in terms of the enactments granting the rights of appeal lie to it. Jurisdiction is conferred on the Supreme Court in any civil case by s 21 of the Supreme Court Act [*Cap 7:13*] ("the Act") which provides that:

> "(1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment, an appeal lies to the Supreme Court."

There is a minimum number of Judges required to duly constitute the Supreme Court when exercising its power to hear and determine an appeal. It shall be properly constituted for the purpose of exercising its jurisdiction before not less than three Judges sitting at the fixed time and place with the assistance of its appropriate officers such as legal practitioners. That is clear from the provisions of s 3 of the Act which state that:

> "For the purpose of exercising its jurisdiction in any matter, the Supreme Court shall be duly constituted if it consists of not less than three Judges."

A Court of law will not entertain proceedings such as an appeal unless it is satisfied that it is competent to do so and that the proceedings have been instituted in the proper form. In providing that for the purpose of exercising its jurisdiction over any matter, the Supreme Court shall be duly constituted if it consists of no less than three Judges, s 3 of the Act effectively precludes a single Judge sitting in chambers or open Court from exercising the power conferred on the Court under s 21.

The words "any matter" in s 3 of the Act include the question whether the terms of the enactment giving the right of appeal from a particular court, limit the power of the Supreme Court to hear the appeal in respect of the order from which relief is sought by the aggrieved party. It is for the Supreme Court duly constituted to make a finding that no appeal lies to it against the order and strike the appeal from the roll. As a single Judge of the Supreme Court cannot determine the matter he or she cannot make the order striking an appeal off the roll. If the appellant intended to have a decision made as to whether the order from which relief was sought by the first respondent was appealable without the leave of the Judge, it should have approached the Supreme Court by way of a court application as required by r 39. It could also have raised the matter by way of a preliminary objection to the exercise of jurisdiction by the Court.

In *Pretoria Racing Club v Van Pietersen* 1907 TS 687 the respondent's legal practitioners took the point that no appeal lay to the Transvaal Provincial Division

in the case because the spoliation order made by the Judge was, in terms of s 22 of Proclamation 14 of 1902 an interlocutory order not appealable without the leave of the Judge who made it. The full court consisting of INNES CJ, SMITH and CURLEWIS JJ accepted that it was for the court in which the appeal was noted to decide on the facts of each case what the nature of a particular order is in order to determine whether it fell within the category of final or interlocutory orders. At p 493 SMITH J writing for the full court said:

> "The point, in my opinion would have been more properly raised as preliminary to the hearing of this appeal when a decision upon it would have been necessary."

It is clear that as the question would have turned on the construction of the terms of the enactment creating the right of appeal which in this case is s 43(1) read with s 43(2)(d) of the High Court Act, it would have been a matter within the competence of the Supreme Court to decide in terms of s 21 of the Act. The order striking the appeal off the roll could only be made following a finding on the nature of the order from which relief was being sought on appeal. The order made by the late MUCHECHETERE JA in the *Croc Ostrich Breeders* case *supra* is of no assistance in the determination of the question raised by this application. It is an unspeaking order which does not disclose the facts on which it was based. It states on the face of it that it was made in a chamber application in terms of r 39 of the Supreme Court Rules. Rule 39 would not permit of an application for that relief to be made to a single Judge sitting in chambers. The order simply declared that the notice of appeal filed by the respondent on 20 November 1998 in the Supreme Court was invalid for want of the appellant thereto having applied for and granted leave to appeal against the judgment of the High Court as provided in s

43(2)(d)of the High Court Act [*Cap 7:06*]. It did not strike the appeal off the roll. One gets the impression that it may have been common cause that the order from which relief had been sought on appeal was an interlocutory order.

Mr *Mlotshwa* argued that a Judge cannot use the discretion conferred on him or her under r 4 of the Rules to direct a departure from a Rule in order to assume jurisdiction which he or she does not have over a matter. I agree. Rules of court are made under s 34 of the Act for the purpose of regulating proceedings of the Supreme Court and facilitate the proper dispatch by the Court of its business. The rules cannot be used to usurp the court's jurisdiction under s 21 of the Act. Rule 4 of the Rules is not applicable to the facts of this case.

I would accordingly dismiss the application on the point *in limine* alone. Just in case I am wrong in the conclusion on that point, 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 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 to 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 issues or cause of action between the parties.

In this case it was common cause that the order made by the learned Judge was a spoliation order. When the applicant made the application for the order to the High Court it placed three issues of fact before it for determination. The first was that it was in peaceful and undisturbed possession of the property at the time the first respondent appeared on the scene. The second was that the first respondent deprived it of such possession unlawfully (without due legal process) and without its consent. In other words the first respondent arrogated to himself the right to take property out of the possession of the applicant.

The third was that it was entitled to be restored to the possession of the farm.

All these facts in issue had to be determined in favour of the applicant for the spoliation order to have been made in applicant's favour. The issue between the parties was therefore whether there was spoliation. By making the spoliation order the learned Judge confirmed that on the affidavit evidence placed before her, she found that the three elements of spoliation had been established. The spoliation order was the authority for the restoration of the applicant to the possession of the property.

The finding of the fact in issue was a final and definitive determination of the fact in question. There would have been no other final determination of the issue of spoliation on the return day. A clear right in the applicant to be restored to the possession of the property would have been established. A spoliation order cannot be granted on evidence of a *prima facie* right.

If the learned Judge was not satisfied or was somehow doubtful that the affidavit evidence established a clear right in the applicant to be restored to the possession of the property she should not have made the spoliation order. Once the order was made and fully executed it was discharged. There would have been no order to discharge on the return day. The fact that the order was in the form of an interim relief is irrelevant to the consideration of the question whether it is final or interlocutory. The issue of an order in the form in which it was applied for does not make the order itself a provisional order. For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding.

It has been the realization of the fact that a spoliation order disposes of the issue or portion thereof between the parties that authorities say that it is a final and definitive order. Herbestein & Van Winsen, "*The Civil Practice of the Supreme Court of South Africa*" 4ed state at p 1064 that:

> "A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a

spoliation. The order that the property be restored finally settles that issue as between the parties."

In *Pretoria Racing Club supra*, the contention was that the spoliation order from which relief was sought on appeal was an interlocutory order not appealable without the leave of the Judge who made it. It was also argued that to allow an appeal from a spoliation order would render useless the remedy intended to be granted to the person despoiled.

Disposing of the argument SMITH J writing for the full bench on the Transvaal Provincial Division said at p 697:

"In order to decide whether such an order is final or not I think the test must be arrived at by considering what the object of the proceedings is as a matter of substance. See the judgment of ROMER LG in Re *Hebert Reeeves & Co* [1902] 1 Ch 29.

Now the substantial matter in dispute in the present application was the right of the respondent to the present possession of certain property: if an act of spoliation was established then his right was clear. That was the matter and the only matter decided by the learned Judge, the consideration that legal proceedings might be subsequently instituted to test whether the possession could be legally sustained appears to me to be foreign to the question at issue, and the order made was in my opinion a final order within the meaning of the Rules of Court.

We were pressed on behalf of the respondent to say that the order was interlocutory from a consideration of the consequences which would follow if an appeal from it was allowed. It was pointed out that if an appeal from a spoliation order is allowed the result will be to keep the matter in suspense so long that the remedy may become useless. With regard to this argument I would say, in the first place, that if the order is in its nature a final order the court would not hold it to be otherwise merely because its execution might be stayed, and the remedy granted by it be delayed."

Nienaber v Stuckey 1946 AD 1049 is authority for the principle that the right to the restoration of possession of the property must be established as a clear right and not a *prima facie* right before a spoliation order can be made. The right must not be open to doubt. At p 1053-4 GREENBERG JA, said:

> "The learned Judge in the court below followed what was said by BRISTOWE J in *Burnham v Neumeyer* (1917 T.P.D. 630 at p 633) viz: "where the applicant asks for a spoliation order he must make out not only a *prima facie* case, but he must prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in his possession and that they were removed from his possession forcibly or wrongfully or against his consent."
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> I agree with what was there said as to the cogency of the proof required. Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict and not a temporary interdict".

The last case I want to refer to on the subject is *Mankowitz v Lownthal* 1982(3) SA 758(A). When dealing with the question whether the court *a quo* was correct in awarding costs to the party in whose favour a spoliation order was made JANSEN JA adopted with approval the following statement of law at 767G-H:

> "Now a spoliation order is a final determination of the immediate right to possession. It may not resolve the ultimate rights of the parties but it is the last word on the restoration of possession *ante omnia*. An application for spoliation is thus not an interlocutory application, and, save in special circumstances, the costs should follow the event, and should not be made to depend on the outcome of some other action or application even if such concerns the ultimate rights of the parties to the property or thing in dispute."

It is clear from the authorities that the learned Judge in *Chikafu v Dodhill (Pvt) Ltd* and the learned Judge President in *Nyikadzino v John Cameron Asher supra*

used the wrong test of considering the form of the order to determine whether it is final and definitive or interlocutory. Many orders which are final in form are in fact interlocutory whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of any subsequent confirmation or discharge. In this case the first respondent had the right to appeal to the Supreme Court against the spoliation order made by the learned Judge on 9 March 2009 without first obtaining the leave of the Judge.

The application is accordingly dismissed with costs.

Gollop & Blank, applicant's legal practitioners

Antonia, Mlotshwa & Co., first respondent's legal practitioners