JULIUS TAWONA MAKONI
versus
PAULINE MUTSA MAKONI
and
THE SHERIFF N.O
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 9 November 2023 & 9 February 2024

Opposed Application

Adv *W Ncube,* for the applicant
Adv *T L Mapuranga.*, for the first respondent

KATIYO J: The applicant petitioned this Court seeking a provisional order in the following terms:

In the interim, **IT BE ORDERED THAT**:

"**INTERIM RELIEF SOUGHT**

That pending the confirmation of this order:

1. The order of this Honorable Court in HC 3500/16 as substituted by the Supreme Court in SC 236/23 be and is hereby stayed.

TERMS OF FINAL ORDER SOUGHT

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

1. That the provisional order be and is hereby confirmed.
2. Pending the determination of the constitutional challenge against the order of the Supreme Court allowing the first respondent's appeal in SC 236/23 to be instituted by applicant within 15 days of availability of the Supreme Court judgment in SC 236/23, the execution of the order of this court under HC 3500/16 as substituted by the Supreme Court in SC 236/23 be and is hereby

stayed.

3. That the costs of suit shall be in the cause.

SERVICE OF ORDER

1. Applicant's Legal Practitioners be and are hereby given leave to serve a copy of the order on the first respondent's legal practitioners."

BRIEF BACKGROUND

On 20 July 2015, the first respondent approached the High Court seeking a final interdict. The background of the matter is, the parties were husband and wife whose marriage was solemnized in Harare on 31 December 1983 and was terminated by a decree of divorce issued by the High Court of England. A decree *nisi* was issued on 1 December 2013 while the final decree absolute was issued on 18 December 2014 by the English court in the United Kingdom. It was for dissolution of marriage and transfer of all immovable matrimonial assets in England and Zimbabwe to the applicant.

Among other properties the applicant was to transfer all of his legal estates and beneficial interest in all of the property 5 Reinfontein Close, Harare. The first respondent approached the court seeking to protect rights conferred by the decree *nisi.* The applicant opposed the application on the basis that the first respondent failed to establish the requirements for a final interdict. During the hearing the first respondent argued that the request was for an interdict and not a final interdict. It is thus important for the requirements of a final and interim interdict to be outlined. The first respondent was seeking for an interdict to stop the applicant from disposing of number 5 Reifontein Close and also an interdict stopping the applicant from transferring No. 5 Reitfontein Close unless ordered by a court of competent jurisdiction.

At the hearing the first respondent sought to amend the relief to reflect that first respondent was not relying on a decree nisi but on a decree absolute since the decree nisi had been confirmed at the time of hearing. The first respondent also further sought an interdict barring the applicant from removing the first respondent's belongings from number 5 Reinfontein Close without the written permission of the first respondent.

The first respondent interdicted from disposing of No 5 Reintfontein Close, Highlands, Harare also known as the Remainder of Subdivision A of Lot 6 Reinfontein situate in the District of Salisbury held under Deed of Transfer No. 04388/95 unless directed by a court of competent jurisdiction. The second respondent was interdicted from effecting transfer of No. 5 Reinfontein Close, Highlands, Harare also known as the Remainder of Subdivision A of Lot 6 Rienfontein situate in the District of Salisbury held under Deed of Transfer No. 04388/95 to anyone unless ordered as such in terms of an order of a court of competent jurisdiction.

On 28 February 2022, both parties approached the court with separate applications which were later consolidated. The applicant filed HC 50/15 impugning the distribution of the property by the High Court of England. The first respondent under HC 3500/16 in turn seeks the registration of the order by the High Court of England.

The dispute between the parties in the consolidated cases is on the distribution of immoveable properties situated in Zimbabwe. The applicant sought that the award to the first respondent of No. 5 Reitfontein Close, Chisipite, Harare is against public policy and the Zimbabwean laws and should not be registered for enforcement purposes. On the other hand, the first respondent sought to have two properties namely No. 5 Reitfontein Close, Chisipite, Harare and Stand 159 Shawasha Hills Township, Harare registered in her name as an order of this Court.

The first respondent argued that the parties both agreed that a decree of divorce should be granted. The first respondent being happy with the entire judgment while the applicant was unhappy about one aspect namely the distribution of No. 5 Reitfontein, Chisipite. They also argued that, the court has no jurisdiction to issue a declarator from the judgment of another court. This court has no power to declare another court ‘s judgment as invalid. This court can recognize or refuse to recognize the judgement of another court.

In the consolidated matter, the applicant argued that public policy demands that the law applicable was that of the husband's domicile at the time of divorce and questioned what law the English Court applied, the applicant's view was that the English Court applied English law to a matrimonial dispute governed by the law of Zimbabwe. The English Court made no reference nor did it apply s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Further that there was no reference or application of Zimbabwean law.

WAMAMBO J found that the order granting the matrimonial property to the first respondent is contrary to public policy and for the purpose of registration should not be so registered. He found that on a balance of probabilities the wife did not prove why the English Court order was to be registered as per the draft order she had proposed. Therefore, found that the order sought by the applicant is appropriate while that sought by the first respondent is without merit.

He ordered that distribution of the matrimonial estate by the High Court of Justice of England in its decree absolute as read with the decree *nisi* to the extent that it awards the property known as No. 6 Reitfontein Close, Chisipite, Harare to Pauline Mutsa Makoni was declared to be against the public policy and the law of Zimbabwe and accordingly not registrable for purposes of enforcement in Zimbabwe and the application was dismissed.

The first respondent appealed the judgment by WAMAMBO J in a High Court order under HC 3500/16 and the application in case number HC 3500/16 was granted in the Supreme Court.

In November 2023, the applicant applied for stay of execution of the Supreme Court order under SC 236/23. The Supreme Court sitting at Harare handed down its order in the matter under SC 236/23. In terms of the order, applicant was required to sign all transfer papers within seven (7) days of the order failing which the order authorizes the Sheriff to sign the transfer papers. Thus, the execution of order becomes operative after 7 days commencing on Friday 3 November 2023.

Aggrieved by the decision of the Supreme Court, applicant intends to lodge a Constitutional Court application for direct access on the grounds that in making the order that it did, the Supreme Court abdicated its constitutional responsibility and additionally violated applicant's constitutional rights to protection of the law, the right to a fair hearing in that the Supreme Court made an order for applicant to pay the costs of transfer when no such order was sought by first respondent and the issue never arose before Supreme Court.

The first respondent is entitled to request second respondent to cause the transfer of applicant's property to first respondent even before the Constitutional Court has heard and determined the application.

If execution is carried out before the intended Constitutional Application is heard, the applicant is of the view that he will suffer irreparable harm.

The first respondent raised five points *in limine*. I will put the arguments as presented by both parties.

URGENCY OF THE MATTER

The application is not urgent for the following reasons:

(a) It is an incompetent case to be heard before this court as it seeks to stay the orders of a superior court. This court has no such jurisdiction. I relate to this point in detail in the second point *in limine*.
(b) The applicant does not intend to approach the Constitutional Court on appeal. He intends an application which does not in itself void the decision of the Supreme Court. His cause and effect do not support the making of the current application as it is inconsequential to the relief of the superior court.

Judgment was handed on 24 October 2023. The applicant had seven (7) days to comply with the Supreme Court order. He did not. He also did not file his application in those given days. He deposed to his founding papers on the 6th day of November 2023. His application was issued a day after. His time to act or seek

avoidance of his actions had lapsed. The Sheriff is now mandated to act beyond him. Application has not been brought at the earliest possible time in accordance with the action expected timelines. The matter not being urgent, urgency was explained in the case of *Kuvarega v Registrar General &Anor* 1998(1) ZLR 188 (HC) 819SB - G CHATIKOTO J held that:

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on the T-shirt complained of.
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> It was not until 30 February 1908 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay. *In casu*, if I had formed the view that it was desirable to postpone the election I may nevertheless, have been dissuaded from granting such an order because, by was already under way. Those who are diligent will take heed. Forewarned is forearmed."

On the other hand, it is submitted that the submission by counsel of the first respondent that this matter is not urgent is not supported by the law and the facts of this matter. Urgency must be satisfied in terms of both time and consequence or harm. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 H and *Mayor Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 78.

The applicant has pleaded that he will suffer irreparable harm if the matter is not heard urgently because his property will be transferred to his former wife by the Sheriff. Although the seven (7) day period in the Supreme Court order has expired, the Sheriff has not signed the transfer papers and the first respondent has not provided any proof that the "the horses have bolted" such as confirming to this court that the Sheriff has signed the transfer papers for the property in issue and the third respondent has effected transfer. So, irreparable harm for applicant is still in the future and, by all means,

it has not yet happened. In other words, the legal interest that the applicant seeks to address is still there, as transfer has not happened.

See *Document Support Centre P/L* v *Mapuvire* HH 117/06**,** wherein whilst discussing the *Kuvarega case*, MAKARAU J (as she was then), postulated that a litigant can still approach a court at the 11h hour for as long as he explains his delay and the harm he anticipates has not happened. In several other cases decided after the *Document Support Centre case*, our courts have also held that where there appears to have been a delay in approaching a court urgently, the Applicant should satisfactorily explain the delay.

THE COURT LACKS JURISDICTION

The High Court cannot grant stay of execution of a judgment of the Supreme Court. This cannot be done under any circumstances. Only the Supreme Court (in terms of the common law) and the Constitutional Court (in terms of statute) has this jurisdiction.

Section 6 of the Constitutional Court Act [*Chapter 7:22*] provides that:

> "**6 Appeals from Supreme Court**
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> An appeal from the Supreme Court to the Court shall not suspend the decision being appealed against unless the Court orders otherwise."

In *CFU* v *Mhuriro & Ors* 2000 (2) ZLR 405 (SC) @408B - E GUBBAY CJ held that:

> "Counsel for the first respondent placed much reliance on this provision.
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> He advanced the submission that, as the High Court is empowered to execute and enforce any judgment of the Supreme Court as if it were an original judgment of its own, it necessarily followed that the High Court is vested with the authority to stay the operation of such judgment.
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> While s7 of the Act undoubtedly leaves it to the High Court to execute and enforce judgments of the Supreme Court, this certainly does not mean that the High Court is empowered to suspend, even temporarily, the effect of an order of the Supreme Court either made in the exercise of its appellate jurisdiction or pursuant to s 24(4) of the Constitution. For such would constitute a direct interference with the authority of a superior court by one subordinate to it. It would be to sanction, as

> occurred in this matter, an interference by a single judge of the High Court with an order concurred in by five judges of the Supreme Court. The proposition only needs to be stated to reveal its inherent flaw. than by way of appeal or review is the court which issued the same."

In the case of *The Church of the Province of Central Africa* v *Diocesan Trustees for the Diocese of Harare & Anor* HH 206/11 UCHENA J (as he then was) held that:

> "This does not in my view entitle a judicial officer to vary, set aside or I interfere with an order made by a court superior to his, or fail to observe judicial precedents based on the hierarchy of the courts. Precedents are based on the hierarchy of the courts and simply require a subordinate court to defer to the decisions of the court superior to it
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> Section 80 of the Constitution provides that; "1) There shall be a Supreme Court which shall be a superior court of record and the final court of appeal for Zimbabwe." Section 80 places the authority of judges of this court under that of judges of the Supreme Court, which is the highest court of the land. It thus, as permitted, by s 79B, places judges of this court under the direction or control of the decisions of judges of the Supreme Court, who are members of the judiciary.
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> Sections 79, and 81 of the Constitution also place the High Court below the Supreme Court. In this case the Supreme Court, while exercising its appellate jurisdiction which carries finality on any issue ordered that execution can be carried out pending the reinstated appeal. Therefore, s79B does not apply to the circumstances of this case. It does not excuse a judicial officer from being bound by a prior decision of a court of superior diction. A judicial officer can therefore not interfere with, vary or set a prior decision of a court of higher jurisdiction."

In the case of *Dube* v *Sheriff of Zimbabwe* HB 3/23 it was held by DUBE-BANDA J that:

> "This is an urgent application wherein initially the applicant sought a provisional order. At the hearing the court *mero motu* raised the issue whether this court has the jurisdiction and the competence to pronounce on validity or lack thereof of a Supreme Court order.
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> For this court to grant or refuse to grant the provisional order sought it must pronounce itself on whether the Supreme Court order is irregular and defective or not. The submission that what was sought to be stayed was a writ issued at the High Court registry was of no substance. At the centre of the dispute is an order issued by three judges of the Supreme Court. It cannot be interrogated and be declared valid or otherwise by the High Court. Mr *Dube* is a legal practitioner of this court, he knows

that this court is inferior to the Supreme Court, it has no competence to pronounce itself on the validity or otherwise of such an order. This must be elementary and basic."

The respondent contends that this Honourable Court has no jurisdiction to grant an order staying execution of a Supreme Court order. The basis on which applicant approached the Honourable Court in this matter is that the Supreme Court order under SC 236/23, substituted the High Court order by seeking the order he seeks 'in his application. The applicant is not inviting the Honourable Court to review or challenge the Supreme Court order but is merely petitioning the High Court to employ its inherent jurisdiction and stay the execution of the order under HC 3500/16 which the Supreme Court substituted the order in HH 222/23 within its order under SC 236/23. By interrogating applicant's prospects of success at the Constitutional Court, this Honourable Court merely looks at whether the underlying *causa* is in dispute. See the principles ordinarily applied by a court in exercising its discretion to stay an execution in *Goista Shakespeare's Pub* v *Van Zyl & Ors* 2011 (1) SA 23 which were summarized as follows:

*"(*a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.

(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.

(c) The court must be satisfied that: (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and 15/2011 (1) SA 148 (CLC) at para 37 18 (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.

(d) Irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed, i.e. where the underlying causa is the subject-matter of an ongoing dispute between the parties.

(e) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute."

INTERIM AND FINAL ORDERS ARE SIMILAR

The applicant argued that the contention that the interim relief sought is similar

with the relief prayed for under the terms of the final order is without merit both on a matter of law and on the content of the two. What the law disallows are not similar terms of the relief sought but relief which is the same. In any event the relief sought under interim relief and under final relief is not the same at all. The interim relief sought is the stay of execution pending the confirmation of the provisional order, in other words, execution is to be stayed pending the full ventilation of the issues on the return date when the matter is fully argued on its merits.

Whereas the final relief sought is a stay of execution after the confirmation of the provisional order and pending the determination of the constitutional challenge to be instituted. Thus, the is the interim relief sought and the final relief sought are not similar let alone the same.

The respondent submitted that the applicant is seeking that the Order of this Honourable Court in HC 3500/16, as substituted by the Supreme Court in SC 236/23, be stayed. This is not possible. The reason why it is not possible is that the only Order made by this Court under case number HC 3500/16 was made by WAMAMBO J in judgment number HH 222/23. That Order was set aside by the Supreme Court thus removing any need for it to be stayed.

The substitution order of the Supreme Court in case number SC 236/23 did not turn the order into a High Court order. It remains a Supreme Court which cannot be interfered with. See the cases of *Tsatsa* v *Superintendent Mpande & Ors* HB 208/16, *Servemox Investments (Put) Ltd* v *Mugweni & Ors* HH 738/19 and Zimbabwe.

Informal Sectors Organisation & Anor v *The Minister of Health and Child Care* HH 36/21.

THE ORDER SOUGHT TO BE STAYED IS NOT ATTACHED

The applicant did not attach the Order which he seeks to have stayed. On p 13 of the application is an Order which was made on the 25th of September 2023 postponing the appeal matter *sine die*. This is not the Order sought to be stayed. The Order sought to be stayed is not attached to the papers, there is no application before

the Court.

In the case of *CFI Holdings Limited & Ors* v *Fidelity Life Assurance Company of Zimbabwe Limited & Ors HH 462/20* it was held that:

> "The two letters which the defendants' legal practitioners attached to their exception are evidence. They constitute evidence which has been improperly introduced into the case of the parties. It was introduced from the bar by the defendants' legal practitioners. Such evidence violates the law of procedure as well as that of evidence. The defendants, it is evident, did not introduce the letters into the case. Their legal practitioners did. They do not explain the method which they employed to introduce the letters into C 4056/18, They do not tell if the method by means of which the letters found their way into the record was, or is, permissible at law. The long and short of the matter is that the letters could not have been introduced by way of annexures. A f*ortiori* given the fact that HC 4056/18 is a suit which is grounded in action, as opposed to motion, proceedings. They should have found their way into the record through the procedure of discovery or through their authors during trial. It is clear that the defendants' legal practitioners introduced the letters from the bar. They assumed the role of the defendants in the mentioned regard. They led evidence in the furtherance of their client's cause. The evidence which the defendants' legal practitioners improperly introduced into the record is inadmissible. Inadmissible evidence, it has already been stated, is no evidence at all. It is as good as not having been given."

The applicant submitted that, admittedly and regrettably, applicant inadvertently attached an order by the Supreme Court postponing the hearing of the same matter, SC 236/33, instead of the court order in the same matter, SC 236/23, which upheld the appeal in issue. In the rush to prepare and file the urgent chamber application, counsel mistakenly attached the wrong order attached to the application. During oral submissions, applicant's counsel acknowledged the omission to attach the correct court order and apologized to the court. The infraction, while totally regrettable does not have the effect of invalidating the entire application. In other words, the failure to attach a document to an application is never visited with the consequence of invalidity of the application. In the founding affidavit, applicant clearly refers to the correct court order as follows:

(a) Paragraphs 7 and 8 are clear that the correct court order was issued by the Supreme Court on 24 October 2023.

(b) Paragraph 6 clearly states that the Supreme Court order in issue reversed the judgment of the High Court under HH 222/23 in respect of the consolidated matters under HC 50/15 and HC 3500/16.

These among other were some of the arguments presented before the court.

CONCLUSION.

Let me hasten to point out that the first respondent has not exhibited good conduct in so far as her impatience to wait for the judgment is concerned. Litigants whilst afforded the right to complain, this privilege must not be abused as some of the complaints border on contempt of court. The office of the Judge or magistrate should be accorded the due respect called of it. This is not to say judges or magistrates are immune from public scrutiny. This is a typical case where within a few days after hearing parties, the first respondent was already demanding a judgement. Not once but more than twice. Can she be warned that in future she may potentially face legal consequences such as contempt of court. This litigant is legally represented and I see no reason why she takes upon herself to do so. However, the observation by the court has no effect as far as this matter is concerned and my decision in this matter will not be influenced by the first respondents' conduct but purely on merit. It was necessary to point out these issues.

Now turning to the issues raised by the learned counsels. This matter was heard by the Supreme Court and there has been an argument that by altering the High Court order the Supreme Court was not in anyway, turning it to be its own order. Let me also point out that this matter was heard on urgent basis by the consent of both parties thereby making that point *in limine* fall away. I will there not bother to revisit it. It is clear from the onset that there is nothing pending in the Constitutional Court which will necessitate this court to stay any proceedings. The High Court is subordinate to Supreme Court and once the Supreme Court makes an order unless specifically provided by that order or by law this court will have no jurisdiction to deal with that matter. The applicant applied for stay awaiting reasons of the Supreme Court judgment so as to have direct access to the Constitutional Court. There is no justification

whatsoever regarding that position as the Supreme Court order is final. This is an application which is standing on nothing and any attempt to try and find legs for it is nothing but mischievous. There is completely nothing advanced to this court to justify this application. Cases presented in the heads of arguments as presented in this judgment are quite evident that this court has no jurisdiction to entertain this matter. Once the Supreme Court altered the judgment it became its own order. In any event the reasons for Supreme Court judgment are not before this court. Even if they had been given, I do not see how I would have dealt with it. The High Court has no jurisdiction to deal with this matter. There is also nothing pending justifying the relief sought. Whilst I do appreciate the thorough research by the learned counsels, I am not at persuaded by the first respondent's argument. Having discussed the issue on jurisdiction, I do not see why I should go to other points as this one is capable of disposing this matter. So, in view of the above findings, I come to the following conclusion.

After perusing papers filed and hearing counsels, **IT IS ORDERED THAT**:

1. The point *in limine* on jurisdiction be and is hereby upheld.
2. The applicant to pay the costs of the suit.

Thompson Stevenson & Associates, applicant's legal practitioners
Munangati and Associates, respondent's legal practitioners