TETRAD INVESTMENT BANK LIMITED
versus
FINWOOD INVESTMENTS PRIVATE LIMITED
and
KILIMA INVESTMENTS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 5 October 2015 & 14 October 2015

Opposed Application

T Zhuwarara, for the applicant
S Hashiti, for the respondent

CHIGUMBA J: The phrase 'good prospects of success on appeal' is used so often that its meaning should be clear and obvious to everyone by now. The phrase has been interpreted to mean that the chances of the appeal being allowed are high, and or that it is more likely than not, that the appeal will be allowed. The difficulty that arises is that the determination of 'good prospects of success' on appeal involves what amounts to a second bite of the cherry for all the parties concerned. It is an opportunity for each party to convince the court *a quo* that its position whether of fact or of law is correct, or put differently, that a different court might come to a different conclusion. This is an application for leave to appeal against the judgment of this court granted in case number HC10031/14, on 26 November 2014 in an urgent chamber application. The order granted in that case was an order staying the execution of an order of this court dated 3 September 2014 in case HC5895/14, pending the determination of a court application for rescission of judgment filed under HC1003/14. It is common cause that the judgment which was appealed against is interlocutory, and that leave to appeal is required in terms of s43 (2) (d) of the *High Court Act [Chapter 7; 06]*.

S43 (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*) …
(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—

An interlocutory order has been defined as 'something that is issued provisionally during a lawsuit'. *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 the case of *Mwatsaka* v *ICL Zimbabwe*[1], this court found that;

> "…a distinction is drawn between interlocutory orders having final effect (which orders are appealable) and those which do not have final effect, in the sense that they do not irreparably preclude some of the relief which might be granted in the main action. The latter are referred to as simple or purely interlocutory orders. Simple interlocutory orders are further sub-divided into those that are appealable before the completion of the trial with leave of the court and orders that are mere procedural rulings which are not appealable before the completion of the trial, even with leave of the court. The main reasons for disallowing appeals in respect of procedural rulings are that, if they were to be appealable, this would lead to a multitude of expensive and inconvenient subsidiary appeals and no hardship is caused to the aggrieved party by disallowing an appeal, because he can raise the issue of the erroneous ruling on appeal after completion of trial."

This matter came before me in chambers, and I directed that it be set down in open court for the hearing of oral argument, despite the fact that the papers were in order and the heads of argument duly filed of record. The judgment of the court in the application for stay of execution pending the application for rescission of judgment was handed down on 26 November 2014. The application for leave to appeal was filed on 12 December 2014. At the hearing of the matter I

[1] 1998 (1) ZLR 1 (H)

asked counsel for the applicant to address the court on whether the application for leave to appeal complied with the provisions of Order 34 r 263 of the rules of this court which provides that;

> **"ORDER 34**
> **APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT**
> ***262. Criminal trial: oral application after sentence passed***
> Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit."

So the first thing to note is that an application for leave to appeal must be made orally immediately after judgment has been handed down. I say judgment because of the provisions of r 269 which provide that;

> "In a case in which leave to appeal is necessary in respect of a judgment of the court given in such proceedings as are described in subparagraph (ii) of paragraph (*c*) and in paragraph (*d*) of subsection (2) of section43 of the High Court Act [*Chapter 7:06*], the provisions of rules 262 to 268 shall apply to an application for leave to appeal and to an application for condonation as if for the words "Attorney-General" there were substituted the word "respondent",

It is common cause that no oral application for leave to appeal was made in motion court on 26 November 2014 when judgment was handed down. Counsel for the applicant, Mr. *Zhuwarara* conceded as much at the hearing of the matter. It was conceded further, that the application is not in the form prescribed by r 263 as follows;

> ***"263. Criminal trial: application in writing filed with registrar***
> Where application has not been made in terms of rule 262, an application in writing may in special circumstances are filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the ground upon which it is contended that leave to appeal should be granted."

The applicant's founding affidavit does not in any way comply with the provisions of r 263. It does not state why no oral application was made on the date of the judgment in terms of r 262. It does not set out any special circumstances. The proposed grounds of appeal were attached to the application, and the reasons why the appeal ought to succeed were stated. Counsel for the applicant had made an erroneous concession that the application for leave to appeal was filed out of the twelve day stipulated period. In light of the fact that the respondents themselves fall foul of r 264 in that they did not file their response to the application for leave

within the stipulated two day period, the court decided in the interests of justice and in finality of litigation to condone both parties lack of apprehension of the provisions of Order 34 and to deal with the merits of the application, on the basis of the papers filed of record. Rule 265 allows for the consideration of the application in chambers, and stipulates that oral argument, may be requested at the discretion of the presiding Judge. Having decided to determine the matter on the papers filed of record, in chambers, the court turned to the merits of the matter.

It is common cause that the order being appealed against in this matter is a simple or purely interlocutory order which is appealable with the leave of the court. The principles which a court will consider when determining an application for leave to appeal are settled. The court accepted the following submissions which were made on behalf of the applicant, as correct; it has been held that;

> "…with regard to that portion of the order which is interlocutory, leave to appeal will be granted when there is a reasonable prospect of success, the amount in dispute is not trifling and the matter is of substantial importance to one or both parties concerned. *Herbstein & Van Winsen The Civil prcatise of the Superior Courts of South Africa 3rd edition page 714-716.* See *Pitchanic NO* v *Patterson.* [2]*and Rood* v *Broderick Properties Ltd*[3]*, Haine* v *Podlashuc & Nicolson,* [4]*Clerk* v *Shepherd*[5]."

The main consideration is the prospects of success on appeal. See *Van Heerden* v *CronWright*[6]*, Botes* v *Nedbank*[7]*, and Castel & Metal Alliied Workers Union*[8]. The court also accepted the submission made on behalf of the applicant that, in the circumstances of this case, there is no doubt that the case is important to both parties and that the amount in dispute is not trifling. The suggestion that the prospects of success on appeal should guide the court in considering whether or not to grant leave to appeal was also accepted by the court. Naturally, the applicant submitted that it has good prospects of success on appeal. The respondents contended that the applicant has no 'good' or 'strong' prospects of success on appeal and referred the court

[2] 1993(2) ZLR 163(H)
[3] 1962 (2) SA 434 (T) @ 435C-D
[4] 1933AD104
[5] 1956 R & N 542 @ 543 E-544D
[6] 1985 (2) SA 342
[7] 1983(3) SA 27(A)
[8] 1987(4) SA 795

to the case of *Radebe v Hough*[9] as a case that ought to provide guidance on the meaning of those words. It is my considered view that good prospects of success on appeal is a phrase which refers to the likelihood that the appeal will be allowed, being high. It refers to the probability of the appeal being allowed, and involves a demonstration that the grounds of appeal have merit, and that the appeal is more probable than not, likely to be allowed.

In this case there are two grounds of appeal; that the court *a quo* grossly erred at law in holding that r 119 of the High Court Rules afforded the first and second respondents twenty(20) working days from the date of service within which to enter appearance to defend; and secondly; that, having held that the respondents had twenty working days to enter appearance to defend, the court *a quo* further grossly erred at law in granting the stay of execution on that basis notwithstanding that the respondents had actually purported to enter appearance to defend twenty one days after being served with summons. The issues for determination are simple, what is the correct interpretation of the High Court rules that govern entry of appearance to defend where summons is served together with, or where it is served without, a declaration? Secondly, did the court in the circumstances of this case, erroneously exercise its discretion when it condoned the failure by the respondents to enter appearance to defend within the twenty day period stipulated in terms of the rules of this court?

It was submitted on behalf of the applicant that r119 of the rules of this court gives a defendant 10 days within which to file a plea after having been served with a declaration. The applicant submitted that r 119 in its second paragraph goes on to provide that in the event that the declaration is served together with the summons, then a defendant has twenty days within which to file a plea. The contention is that the rule does not deal with the time for entering appearance to defend. Here is what r 119 states;

> ***"119. Time for filing plea, exception or special plea***
> The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:
>
> Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 <u>There shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as</u> calculated in terms of rule 17." (my underlining for emphasis)

[9] 1949 (1) SA 380

Clearly, the first part of the rule, as well as the heading, deals with the time for filing a plea, exception or special plea. The proviso is a different matter. Rules 17 and 113 provide as follows;

> ***"112. Barring: failure of plaintiff to file declaration***
> Where the defendant has entered appearance to defend and the plaintiff has failed to file his declaration within twelve days of the date of entry, the defendant may give the plaintiff notice of intention to bar him from declaring.
>
> ***113. Filing and service of declaration***
> Subject to the provisions of rule 112 the plaintiff may file and serve his declaration with the summons or at any time after issue of the summons."

Rule 17 states that;

> ***"17. Time allowed for entering appearance to defend: dies induciae***
> The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service."

Rule 112 provides that, where summons has been served without a declaration, and a defendant has entered appearance to defend, the plaintiff must file the declaration within twelve days of the date of entry of appearance to defend failing which the defendant may serve a notice to plead and bar on the plaintiff. Rule 113 simply provides that summons may be filed and served with or without a declaration. Rule 17 simply provides that once a summons is filed, with or without a declaration, and served on the defendant, the time for entering appearance to defend shall be ten days exclusive of the date of service. Rule 119 provides that a plea shall be filed by the defendant within ten days of the date of service of the plaintiff's declaration. Quite clearly the date of service of the plaintiff's declaration will differ where summons is filed with, and where it is filed without, a declaration. That is the purpose of the proviso to r 119. Where summons is served together with the declaration there shall be added to the period of ten days to the time allowed a defendant to enter appearance to defend as calculated in terms of r 17. Add ten to ten and the period is twenty days.

It is not correct in my view, that r 119 deals in its entirety with time frames for filing a plea, exception or special plea. The court was referred to three cases as authority for this proposition, which are all distinguishable from the circumstances of this case, or, with respect to the applicant erroneously applied to the circumstances of this case. The case of *Russell Noach*

Private Limited v *Midsec North Private Limited*[10],which the applicant seeks to rely on involved the question of whether the defendant was entitled to apply for further and better particulars after being served with a notice to plead and bar. It was held that;

> "… the respondent was entitled to ignore the request for further particulars. If the applicant had wanted further and better particulars, it had 12 days from the date when the particulars were delivered either to file a plea or request the further particulars. By failing to do so, it lost the right to dictate the next procedural step and so became liable to being barred. The power was then vested in the respondent to determine the next step. The applicant failed to do what was required of it by the respondent, which was to file its plea within four days. It had no right to file a request for further particulars. The request was invalid for being filed out of time, and improper, because it was not what it was required to do. The bar was thus properly imposed and default judgment properly obtained".

This case does not turn on the service of summons with or without a declaration. It does not turn on the time within which to enter appearance to defend when summons is served with or without a declaration. It deals with the procedures after appearance to defend has been entered and it is time for the filing of a plea, after service of a notice to plead, and the propriety of requesting further and better particulars after being served with a notice to plead. This case cannot be authority for the proposition that r 119 deals exclusively with the times for filing a plea or exceptions as submitted by the applicant. The wording of r 119 at the time that this case was decided in 1999 is immaterial to the matter that fell for determination in the application for stay of execution. It is not correct that a defendant had then and now has twenty days within which to file a plea. The filing of a plea by the defendant depends on the date when appearance to defend is entered. It can be entered 2 days, 5 days or ten days after the service of the summons. Immediately on entering appearance to defend, the time within which a declaration must be served begins to run, where the summons was served without the declaration, once the twelve day period expires, a notice to file the declaration or failing which be barred may be filed. The applicant's prospects of success are "poor," because its interpretation of rule 119 is not supportable, or sustainable at law, or on the facts.

The rules of this court were put in place in order to facilitate the expeditious dispatch of cases. See *Kombayi* v *Berkhout*[11]. The purpose of the rules, is to buttress the rules of natural

[10] 1999(2) ZLR 8 (H)

[11] 1988 (1) ZLR 53 (SC)

justice, and to ensure that every litigant is afforded an equal opportunity to be heard. See *Metsole* v *Chairman, Public Service Commission & Anor*[12]. The rules of procedure are meant to be followed both by the court and by litigants. See *Makaruse* v *Hide & Skins Collectors Private Limited*[13]. In order to guard against potential injustices that could arise from slavish adherence to the rules, the legislature saw fit to allow the court a measure of discretion to depart from its own rules in the interests of justice. Rule 4C provides that;

> ***"4C. Departures from rules and directions as to procedure***
> The court or a judge may, in relation to any particular case before it or him, as the case may be—
> (*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice".

It is common cause that the respondents were out of time by one day. They ought to have entered appearance to defend after twenty working days. The court found that it was in the interests of justice to condone this failure to enter appearance to defend one day out of time, because of the importance of the matter to both parties, and the substantial amount of cash involved. It would not have served the interests of justice to allow execution of judgment to proceed in those circumstances, when an application for rescission of the judgment granted in default was pending. The court found that the respondents had good cause for their non compliance with r 119. This was a proper exercise of discretion on the part of the court. See *Forestry Commission* v *Moyo*[14], where it was held that non compliance with the rules can be condoned for good cause shown.

The applicant's prospects of success on appeal are poor. The probabilities support a finding that the interpretation of r 119 given by the court in the main matter is more likely than not, to be correct. The applicant relied on case law which is distinguishable from the circumstances of this case. There is nothing that precludes this court to condone a failure to comply with its own rules where it is of the view that good cause has been shown, and where it would be in the interests of justice to do so. In this case a failure to file appearance to defend by one day, in circumstances where the matter is of vital financial importance to both parties, where

[12] 1989 (3) ZLR 147(S)
[13] 1996 (2) ZLR 60 (SC)
[14] 1997 (1) ZLR 254 (SC)

the amount involved is substantial, was not an erroneous exercise of discretion on the part of the court. The reasons why the court found it to be in the interest of justice to do so were enunciated in the judgment on the urgent application for stay of execution.

For these reasons, the application for leave to appeal be and is dismissed for want of merit, with costs.

Messrs Mawere & Sibanda, applicant's legal practitioners
Messrs Mutamangira & Associates, respondents' legal practitioners