

DISTRIBUTABLE (3)

PORTLAND HOLDINGS LIMITED

v

**(1) TUPELOSTEP INVESTMENTS (PROPRIETARY) LIMITED (2)
TOBACCO WAREHOUSE & EXPORT t/a BAK LOGISTICS**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & OMERJEE AJA
MARCH 12, 2013**

T Mpofu, for the appellant

L Uriri, for the respondents

GOWORA JA: After hearing counsel in this matter, we allowed the appeal with costs and issued an order in the following terms:

“IT IS ORDERED THAT:-

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“The application is hereby granted in terms of the draft order.”

We intimated that our reasons would follow in due course. These are they.

The appellant, hereinafter referred to as (“Portland”) and the second respondent hereinafter referred to as (“Bak Logistics”) are private companies duly registered as such under the laws of this country. Portland is a producer of cement which is sold both

locally and externally. Bak Logistics provides warehousing and bulk storage services to the general public.

The first respondent, hereinafter referred to as (“Tupelostep”) is a company registered under the laws of South Africa. It has its headquarters in that country. It provides extensive haulage freight services throughout Southern Africa.

At the beginning of 2012, Portland obtained orders for the export of cement to Mozambique. Sometime in February or March 2012, Portland engaged Tupelostep to arrange the transportation of cement into Mozambique on its behalf. The terms of the contract obliged Portland to convey the cement to Tupelostep by rail. In turn, Tupelostep would arrange for the storage of the cement pending receipt of export documents from Portland. In order to comply with its obligations under this contract, Tupelostep entered into an agreement with Bak Logistics for storage and warehousing of the cement pending its conveyance to Mozambique. On receipt of clearance documents from Portland, Tupelostep would then arrange for the transportation of the cement by road. The process would, on occasion, entail the hire of vehicles from third parties. There was however, no contract between Portland and Bak Logistics, and Portland was not privy to the contract between Tupelostep and Bak Logistics.

In September 2012 Portland transported a consignment of 1 270 tons of cement to Tupelostep by rail. It was stored with Bak Logistics. A dispute then arose between Portland and Tupelostep regarding charges claimed by the latter in the discharge of its obligations and services under the contract. The parties attempted to settle the dispute but failed. In December 2012 Tupelostep advised Portland that it would no longer allow

movement of stock from the warehouse unless it was paid certain sums of money being claimed by it for demurrage and transportation costs.

On 16 January 2013 Portland gave notice to Tupelostep of its intention to terminate the mandate for storage and transportation of the cement. On 29 January 2013, Portland addressed an email to Tupelostep demanding the release to it of documentation availed to Tupelostep in respect of the consignment of cement under its control and in the possession of Bak Logistics. In turn, Tupelostep responded by refusing to release the documents in its custody for a number of reasons which are not germane to the resolution of this dispute. On 4 February 2013 Portland filed an urgent application with the High Court in respect of which it sought relief expressed as follows:-

INTERIM RELIEF GRANTED

1. Pending determination of this matter, the Applicant is granted the following relief;
 - 1) That 1st and 2nd Respondent be and are hereby ordered to release to applicant the applicant's cement being 1 270 tons of cement held by 1st and 2nd respondent at 2nd respondent's premises at 106 Dartford Road, Willowvale Industrial Area, Harare.
 - 2) That the proceeds of sale of the cement be held at a trust account in the law firm of Messrs Gill, Godlonton & Gerrans of 7th Floor, Beverly Court 100 Nelson Mandela Avenue.

TERMS OF THE FINAL ORDER SOUGHT

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

1. That the proceeds of the cement held by Messers Gill, Godlonton & Gerrans in their trust account be disbursed in terms of an order of this Honourable Court confirming the entitlement of either party to such proceeds.
2. That the costs of this application be borne by the party succeeding in the anticipated litigation between the parties. (sic)

The application was opposed by both respondents. The High Court heard the parties on the question of urgency and decided that the application was not urgent. The court then dismissed the application with costs on the basis of lack of urgency. This appeal is against that decision.

It was contended that the High Court erred in the exercise of its discretion and that, to that extent, it had misdirected itself.

Portland approached the High Court for urgent relief on the premise that Tupelostep was holding on to cement which belonged to the former and that its actions were illegal and unjustified. It was also alleged in the certificate of urgency that cement by virtue of its hygroscopic nature had a limited lifespan and that any continued delay in its release to Portland would result in financial loss to Portland. Whilst accepting that commercial interests can be advanced as a basis for urgency, the learned judge in the court *a quo* found that the urgency in the matter before him was self-created. This is what the learned judge stated:-

“I am however persuaded by counsel for respondents’ argument that the urgency pleaded by the applicant is self-created. In the first place it was not denied that the cement has been with the respondents since September 2012. If therefore, cement has a short shelf life why did the applicant not seek its release much earlier? Secondly, the argument that it tends to attract moisture is as relevant now as it was from the onset of the rainy season. The need to act was ever present from the onset, taking into account the nature of the product that is in dispute. In other words, the matter cannot assume more urgency towards the end of the shelf life of a product whose delicacy has never been in doubt.”

It seems to me that the court *a quo* determined the matter on facts which were not before it. The consignment of cement was sent to the ware house in September 2012, but the record shows that there was movement of stocks from the warehouse without hindrance.

The problem arose on 16 January 2013 when Tupelostep wrote an email to Portland advising that a halt had been placed on the movement of the product from the ware house on its instructions. That is when in fact the need to act arose and not in September 2012 as stated by the learned judge in the court *a quo*. This fact is confirmed by the opposing affidavit filed on behalf of Tupelostep in which the statement is made that:

“up until 15 January 2013 the first respondent never prevented the removal of cement.”

It is therefore accepted by Tupelostep that cement was being moved up until that date. If Portland had the right to remove cement up until that date, it follows that the need to act cannot by any stretch of the imagination have arisen prior to that date. In its judgment, the court accepted that what triggered the application was the negation on 31 January 2013 of an agreement by the parties allowing the removal of the cement by Portland. The application was filed on 4 February 2013, a mere four days after the agreement was negated by Tupelostep. The suggestion that the cement should have been removed in September 2012 is therefore not supported by the record as the storage in September was for purposes of facilitating its transportation. The storage was part and parcel of the *modus operandi* of the contract by the parties. I am satisfied that the matter ought to have been dealt with on the basis of urgency. No delay had been established on the respondents' papers.

Portland also alleged urgency on the premise that cement had a limited shelf life and that any delay in access to the product for purposes of sale would result in economic loss. Whilst accepting that the law recognised economic loss as a factor for urgency, the court rejected an argument for the granting of relief on this basis on the grounds that the cement had been with Tupelostep and Bak Logistics since September 2012 and that its release should have been sought earlier. Again, the learned judge fell into error in his

assessment of the evidence before him. The Court placed reliance on the date when the consignment was sent to Bak Logistics and fell into the error of regarding that date to be the time at which it should have sought its removal from storage. The court *a quo* failed to appreciate that the cement was destined for export orders and that any failure on the part of Portland to deliver would cause it harm in the eyes of its external customers.

In addition, the refusal to release export documents would place Portland at cross purposes with the exchange control authorities through its failure to acquit CD1 export forms. These factors although adverted to in the application were not dealt with by the court *a quo*.

Tupelostep is a *peregrinus*, a fact which was not disputed before the court *a quo*. It was contended on behalf of Portland that the fact that Tupelostep is resident in South Africa would tend to complicate issues as the suit would have been instituted in that country. It was contended further that in the event that it was sued in this country, any judgment obtained as a result would have to be registered there. All this entails a lot of litigation and the remedy of damages then becomes theoretical. The court *a quo* however felt persuaded that there was an alternative remedy available to Portland and consequently there was no urgency to the application.

The practical difficulties attendant upon such a process for recovery should have been obvious to the court. The failure by the court to appreciate these factors was a clear misdirection warranting the interference by this Court with the exercise of its discretion.

However, over and above these criticisms, the High Court, having decided to determine the matter on the issue of urgency, dismissed the application on the basis that it was not urgent. This was not the proper course to follow. Instead, it should have removed the matter from the roll on the basis that it lacked urgency. Such a course would have left the door open for the appellant to place the matter before the court for determination as an ordinary court application. In *Madza & Ors v The Reformed Church in Zimbabwe Daisyfield Trust* SC 71/14, ZIYAMBI JA remarked as follows:

“However, having concluded the matter was not urgent, the proper course would have been to remove the matter from the roll of urgent matters to allow the appellants, if so minded, to place the matter before the High Court on the ordinary roll for determination. The order of dismissal was improper in the circumstances.”¹

I respectfully associate myself with the *dicta* by her Ladyship. It follows that the dismissal of the application for want of urgency is improper.

It is also contended on behalf of Portland that, in addition to this, the court fell into further error by commenting on the merits of the case. It is contended that even if this court were to remit the matter for hearing before the High Court a plea of *res judicata* could be successfully raised by the respondents. I agree, in *Purchase v Purchase* 1960 (3) SA 383, CANEY J had this to say:²

“... He submitted that that dismissal of an application had the effect of an absolution; he likened that to dismissal of an action, which is an absolution from the instance. *Becker v Wertheim, Becker and Leveson*, 1943 (1) P.H. F 34 (A.D.). I am disinclined to agree with him, for I think that dismissal and refusal have the same effect, namely a decision in favour of the respondent.”

¹ At p 8 of the cyclostyled judgment

² At p 385A-B

This principle was approved in *African Farms & Townships v C.T. Municipality* 1963 (2) S.A 555 by STEYN C.J where he stated as follows:³

“Counsel for the appellant further argued that the order in the original proceedings, which as such is an order dismissing the application, is to be equated with absolution from the instance, leaving the issue undecided. In my view there is no substance in that argument. As Sande, De Diversis Regulis ad L 207, points out, the res judicata is not so much the sentia, the sentence or the order made, as the lis or negotium, the matter in dispute or question at issue about which the sentia is given, or the causa which is determined by the sentia judicis. As pointed out in Purchase v Purchase, 1960 (3) SA 383 (N) at p 385, dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same papers. In Commissioner of Customs v Airton Timber CO Ltd, 1926 CPD 351 at p 359, WATERMEYER J, draws a distinction between the actual judgment and the reasons for judgment, and the question is not necessarily determined by the judgment, the matter is not res judicata.”³

Being a Court of Appeal, this Court cannot interfere with the exercise of judicial discretion by a lower court except in very limited circumstances. Counsel for the parties in this case have advocated two approaches to the manner of determining the appeal. The approach favoured by Mr Mpofo is set out in *Crouch v Dube* 1997 (1) ZLR 427 (S). AT 436d-437F KORSAN JA described it as follows:

“Learned counsel were in agreement that the remedy provided under r 359 was of a discretionary nature, but they differed as to the category of the discretion which the court of first instance exercised under r 359. The reason for their disagreement is exemplified in the following statement by STEGMAN J in Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd 1989 (4) SA 31 (T) at 351-36H:

“... when the exercise of a discretionary power by a court of first instance is taken on appeal, the court of appeal is faced with at least two distinct tasks. The first task relates to the general characterisation of the discretionary power in question in the case. The purpose is to determine whether the function of the court of appeal is to re-examine any aspect which the parties may seek to re-argue on the existing record; or whether such court’s function is limited to an enquiry into the question whether the court below exercised its discretion judicially. When that task of characterisation has been performed, the second task (if it arises at all) relates to the examination of the particular exercise of the discretionary power by the court of first instance, and the decision whether

³ At p 563D-G

or not to interfere with it. The nature of such second task varies according to the characterisation of the discretionary power in terms of the first task.

There are at least two categories to one or other of which the discretionary powers exercised by courts of first instance may be assigned. The first of such categories relates to matters having the character of being so essentially for determination by the court of first instance that it would ordinarily be inappropriate for a Court of Appeal to substitute its own discretionary power for the exercise thereof decided on by the court of first instance. The first matters identified as falling within this category were those discretionary powers that related to a judge's control of the conduct of the business in his own court. Later the first category was broadened to include certain other discretionary powers.

The second category relates to matters having the character of being equally appropriately determinable by the court of first instance and the court of appeal.

When a particular discretionary power has been found to be of the character which places it in the first category, the court of appeal has no jurisdiction to substitute its own exercise of discretionary power for that decided upon at first instance unless it has been made to appear that the exercise of the power at first instance was not judicial. That can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle or with bias or without substantial reasons.

When a particular discretionary power has been found to be of the character which places it in the second category, the court of appeal has jurisdiction to substitute its own exercise of the discretion for that decided upon at first instance without first having to find that the court of first instance did not act judicially. Sufficient reason for the court of appeal to do so must be shown, but the reason need not reflect on the judiciality of the decision at first instance. The court of appeal may interfere on the simple basis that it considers its own exercise of the discretionary power to be wiser or more appropriate in the circumstances.”

Mr *Uriri* however has placed reliance on *Barros & Anor v Chimphonda* 1999

(1) ZLR 58 (S). At p 62F-63A, the learned GUBBAY CJ stated:

“The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion, see *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its

determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing.”

The substance of the principles in the authorities relied upon by both counsel is the same. What was at issue in the lower court was whether or not the court, in the exercise of its discretion, considered the application placed before it to constitute urgency justifying the matter being heard and determined outside the normal roll. In the case of *Crouch v Dube* (supra) it was held by the court that this category of exercise of discretion by an appeal court cannot be interfered with unless it has been made to appear that the exercise of the power at first instance was not judicial. Both counsel are agreed that the case in point is not one where the Appeal Court is in as good as the court of first instance of being equally able to determine the matter and substitute its own discretion for that of the court of first instance. An appeal court cannot interfere with an exercise of judicial discretion unless it can be shown that some error was made in the exercise of that discretion or that the court acted on a wrong principle or allowed extraneous or irrelevant material to guide or affect its decision.

Although purporting to dismiss the application on the basis that it lacked urgency, the court *a quo* did make pronouncements on the merits of the application. At p 2 of the judgment the learned judge states:

“A perusal of the papers convinced me that there was no basis for granting the interim relief sought and I declined to set the matter down.”

Later on in the judgment at page the learned judge again comments on the merits of the application and states:

“I would have held the same in the present case save that the reasons advanced for seeking interim relief cannot be sustained.”

And later at p 3:

“If the respondents are owed substantial sums of money by the applicant they would be entitled to a right of retention over the applicant’s goods. There is nothing unlawful about such retention as claimed by the applicant. It seems the applicant is basing illegality on the respondents’ refusal of the security that is being offered. But, as contended by Mr *Uriri* no adequate security arrangements have been made by the applicant. For example, he highlighted that security equivalent to the value of the goods is far less than what is owed to the respondents. He further pointed out that there has not been payment of transport costs acknowledged by the applicant.”

As a consequence of the comments by the learned judge as to the merits of the dispute, I am not persuaded by the argument advanced by Mr *Uriri* that the learned judge in the court *a quo* did not deal with the matter on the merits. The judgment has specific findings on the merits of the application, which findings are not confined to the issue of urgency. The judgment speaks to the security being offered by the applicant being less than what is allegedly owed as transport costs. It mentions that no costs had been paid even though the sum due was acknowledged by the applicant.

It is for the above reasons that the court determined that the appeal had merit and granted the same with costs.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Muza & Nyapadi, respondents' legal practitioners