

HH 306-12
HC 8542/10

THE PRESIDENT OF ZIMBABWE, ROBERT GABRIEL MUGABE
(In his official capacity)
and
DAVID KARIMANZIRA
and
CAIN MATHEMA
and
MARTIN DINHA
and
AENEAS CHIGWEDERE
and
FABER CHIDARIKIRE
and
JASON MAX KORERAI MACHAYA
and
CHRISTOPHER MUSHOHWE
and
ANGELINE MASUKU
and
TOKOZILE MATHUTHU
and
TITUS MALULEKE
and
THE MINISTER OF LOCAL GOVERNMENT, RURAL AND
URBAN DEVELOPMENT
versus
MORGAN RICHARD TSVANGIRAI
In his official capacity as the Prime Minister
of the Republic of Zimbabwe and his personal capacity

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 26 June 2012 and 24 July 2012

Mr *T. Hussein*, for applicants
Adv *T. Mpofu*, for respondent



CHIWESHE JP: The applicants seek leave to appeal against the judgment of this court granted under case HH 273-12 (HC 8542/10). In that case the applicants raised a point in *limine* in which they sought to rely on the provisions of r18 of the Rules of Court to preclude the respondent (then applicant) from pursuing an application against the first applicant on the ground that prior leave of this court had not been obtained. I dismissed that

preliminary issue and granted leave for the applicants to file their opposing papers so that the matter could be determined on the merits.

The applicants wish to appeal against that decision. They have filed the present papers seeking leave to so appeal.

The respondent opposes the grant of leave to appeal on three grounds. Firstly, he questions the authority of the deponent to the founding affidavit, Mr D. Mangota, the Secretary for Justice and Legal Affairs, to so depose to the founding affidavit. Secondly, he argues that the order sought to be appealed is a procedural ruling which is not appealable even with the leave of the Court. On the merits of the case the respondent argues that the Supreme Court has already pronounced itself on the matter in the case of *Zimbabwe Lawyers for Human Rights and Anor vs President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (S) in which it held that the President can be sued in his official capacity without leave of the court.

I agree with the applicants that an application for leave to appeal need not be clogged in undue formality. Indeed this is an application which could have been made orally in court had the court's decision been made available at the time. For that reason the authenticity or otherwise of Mr Mangota's founding affidavit is irrelevant to the issues at hand.

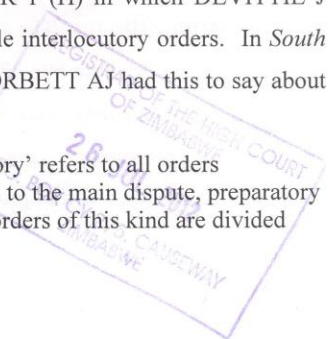
Is a procedural ruling appealable? The answer to that question must be in the affirmative, provided leave to so appeal is granted. That view is consistent with the decision of the Supreme Court in *Jesse v Chioza* 1996 (1) ZLR 341 (S). Further s 43 (2) of the High Court Act provides:

“(2) No appeal shall lie –

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- (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 -”

See also *Mwatsaka vs ICL Zimbabwe* 1998 (1) ZLR 1 (H) in which DEVITTIE J discusses in detail the distinction between rulings and simple interlocutory orders. In *South Cape Corp vs Engineering Mgmt SVCS* 1977 (3) SA (A) CORBETT AJ had this to say about interlocutory orders:

- “(a) In a wide and general sense, the term ‘interlocutory’ refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes,:



- (i) Those which have a final and definitive effect on the main action: and
- (ii) Those known as simple (or purely) interlocutory orders proper which do not."

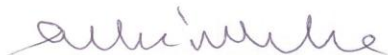
The first class of orders is appealable in the normal course of events while the second class is appealable only with the leave of court.

There is no doubt that on the face of it the point in *limine* raised by the applicants would not have been dispositive of the application on the merits. It is a point of procedure rather than substance. It merely sought to bar the application on the grounds that a rule of court had not been complied with. For that reason the applicants cannot approach the appeal court without leave of this court.

Should leave to appeal be granted as requested by the applicants? The applicants' main argument is that the matter is of immense public interest and should be clarified by the Supreme Court. However, the Supreme Court has already adjudicated the legal status of r 18 of the High Court Rules. It did so in the *Zimbabwe Lawyers for Human Rights* case *supra*. I have no doubt in my mind that the President or any other member of the executive can be sued in his official capacity without leave of this Court.

In any event it is not in dispute that there are many other cases, past and pending, in which the president has been sued in his official capacity. No similar objections have been raised by the parties or the courts, a fact which tends to confirm that the applicants' position is unprecedented and unsupportable at law.

For these reasons I would, as I hereby do, order that the application for leave to appeal be dismissed with costs.



Hussein Ranchhod & Co, applicants' legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners

