NATIONAL ASSOCIATION OF THE DEAF T/A
ZIMBABWE NATIONAL ASSOCIATION OF THE DEAF
versus
SANDYBEDS INVESTMENTS (PRIVATE) LIMITED
and
ODAR HOUSING DEVELOPMENT CONSORTIUM
and
THE SHERIFF OF HIGH COURT
and
OFFICER COMMANDING POLICE, HARARE PROVINCE,
ZIMBABWE REPUBLIC POLICE N.O
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC SERVICE (SIC)

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 9, & 21 November, 2022 & 17 May 2023

Urgent Chamber Application

Mr *R E Nyamayemombe with* Mr *B Mlauzi*, for the applicant.
Mr *D Matimba,* for the 1st respondent.
Ms *S Gowero,* for the 4th respondent.
No appearance for the 2nd, 3rd and 5th respondents.

DEME J: On the last day of hearing of this application, I delivered an interim order pending the determination of the present application to the effect that:

> "That pending the handing down of the judgment under this urgent chamber application, the 1st and 3rd Respondents are hereby directed to stay execution of judgment under HC 5790/22 against the applicant."

The applicant approached this court on an urgent basis seeking the relief for stay of execution of judgment expressed in the following way:

"TERMS OF THE FINAL ORDER SOUGHT

1. That the Respondents show cause to this Honourable Court why a final order should not be granted in the following terms:

2. That writ of the ejectment issued by this Honourable Court on the 17th of October 2022 in case No. HC5790/22 be and is hereby declared null and void in respect of the Applicant in this matter, namely NATIONAL ASSOCIATION FOR THE DEAF especially in respect of a certain piece of land known as Stand 6545 Odar Township of Stand 38 Odar Township measuring 1973 Square Meters, Harare.
3. No ejectment, eviction of Applicant from a certain piece of land known as Stand 6545 Odar Township of Stand 38 Odar township measuring 1973 Square Metres, Harare shall be effected pending the determination of the proceedings for rescission of judgment under case number HC5790/22.
4. No demolishment of Applicant's immovable property on a certain piece of land known as Stand 6545 Odar Township of Stand 38 Odar Township measuring 1973 Square Metres, Harare shall be effected pending the determination of the proceedings for rescission of judgment under case number HC5790/22.
5. The 1st Respondent shall pay the costs of this application on attorney and client scale."

TERMS OF THE INTERIM RELIEF GRANTED

6. That pending the determination of this matter on the return day, the Applicant be and is hereby granted the following relief:
7. The 1st and 3rd Respondent (sic) shall not eject the Applicant from a certain piece known as Stand 6545 Odar Township of Stand 38 Odar Township measuring 1973 Square Metres, Harare pending determination of its application for rescission of default judgment under HC7415/22.
8. The 1st and 3rd Respondent (sic) shall not demolish Applicant's property or any dwelling on a certain piece of land known as Stand 6545 Odar Township of Stand 38 Odar township measuring 1973 Square Metres, Harare or levy any costs against the Applicant pending determination of Applicant's case under HC7415/22."

I will firstly give factual background of the present application before applying the law to the facts. The applicant is a private voluntary organisation registered in terms of the laws of Zimbabwe. The applicant was served with the copy of the notice of ejectment on 2 November 2022. The notice was issued pursuant to the default judgment granted under case number HC 5790/22 in respect of Stand 6545 Odar Township of Stand 38 Odar Township, Harare (hereinafter called "the property"). The applicant was not a party to the proceedings under case number HC 5790/22. Consequently, the applicant filed application for joinder and rescission of default judgment under case number HC 7415/22 and the application is still pending. The ejectment of the applicant from the property was due to take place on 7 November 2022.

According to the applicant, it was offered by the fifth respondent various stands including the property in question some time in 2012. The applicant also alleged that after complying with the requirements including the payment of required deposit of the purchase price, the applicant was issued with the lease agreements including the lease agreement for the property in question. The applicant also affirmed that it proceeded to take occupation of the property some time in 2012 and thereafter constructed the three roomed office at the property.

According to the applicant, it enjoyed peaceful and undisturbed occupation of the property until the date when it received notice of its ejectment from the property. The applicant also asserted that it paid the full purchase price for the property in 2016. The applicant, in addition, averred that in 2021 it received funding from the Japanese Embassy for constructing its school for sign language. It is the applicant's case that the school is now almost complete. Furthermore, the applicant claimed that it was never served with the court application for eviction under case number HC 5790/22 and was not in the full picture of all events and only became aware of such events when it was served with the notice of ejectment by the third respondent on 2 November 2022.

The applicant maintained that the order for ejectment was directed against the second respondent. It is the applicant's case that it is not related to the second respondent in any way whatsoever and it does not claim occupation of the property in dispute through the second respondent. The applicant also alleged that the order was served on the applicant and not on the second respondent which has a separate address of service. The applicant additionally averred that the second respondent was not in occupation of the property in question and wondered why the first respondent chose to cite the second respondent instead of the applicant which is in occupation of the property.

The applicant asserted that the application under case number HC 5790/22 was served on the second respondent with an address which is not on the property in question. It is the applicant's affirmation that if the application had been served at the property in dispute, it would have proceeded to apply for joinder. The applicant affirmed that failure to serve the process at the property in question causes serious prejudice to it as its rights were affected by that manner of service. The applicant also contended that if the order is executed, it will stand

to suffer prejudice as the improvements erected at the property will be destroyed without undue process.

With respect to urgency, the applicant claimed that the present application must be treated with the greatest degree of urgency. The applicant also averred that if this is not done, the applicant will stand to suffer incurable prejudice. According to the applicant, it only became aware of the ejectment proceedings on 2 November 2022 and thereafter it acted with reasonable speed in arresting the situation by filing the present application and application for joinder and rescission of default judgment under case number HC 7415/22. The applicant also alleged that its legal practitioners engaged the first respondent's legal practitioners with a view to harness the situation but the latter indicated that they were still consulting with their client.

The applicant averred that the school of sign language which it constructed is the first school to be constructed in Zimbabwe and hence its destruction will be prejudicial to the beneficiaries of that project. It is the applicant's contention that the balance of convenience favours the granting of the present application as determining otherwise will seriously prejudice the applicant which had made some improvements at the property. The applicant also affirmed that there is no other satisfactory remedy that may effectively arrest the situation given that it is on the verge of being ejected from the property. Furthermore, the applicant asserted that the ordinary application will not be able to stop the ejectment which was about to take place on 7 November 2022. It is the applicant's case that the application for rescission of default judgment enjoys some prospects of success given the amount of investment which it did on the disputed property.

The application was opposed by the first respondent. In opposing the application, the first respondent raised numerous points *in limine*. Firstly, it raised the point *in limine* to the effect that the present urgent chamber application is not accompanied by the proper certificate of urgency. The first respondent averred that the purported certificate of urgency filed is dated 11 September 2020 while the founding affidavit is dated 7 November 2022. The first respondent also asserted that the certificate of urgency does not specify the nature of urgency contemplated. Moreover, the first respondent asserted that the author of the certificate of urgency averred that the property in dispute belongs to the applicant while this is opposite to the assertions in the founding affidavit where the applicant confirms that the

property in dispute belongs to the first respondent. The first respondent consequently motivated the court to disregard the certificate of urgency on the basis of defectiveness. Mr. Matimba referred the court to the case of *Oliver Mandishona Chidawu and Others* v *Jayesh Sha and Others*[1] *and Nyakudya* v *Vibranium Resources (Pvt) Limited*[2].

On the other hand, the applicant insisted that the certificate of urgency is valid as it specifies the nature of urgency. The applicant highlighted that the certificate of urgency is not supposed to, as a matter of rule, address the merits of the matter and hence the first respondent should not use it to assess the merits of the present application. The applicant also claimed that due to the urgency of the matter, errors were committed in preparing the certificate of urgency which resulted in the wrong date being endorsed on the certificate of urgency. Resultantly, the applicant prayed for the court to condone the defect and additionally requested for leave to amend the certificate of urgency. The applicant through Mr Nyamayemombe submitted that the defect of the wrong date complained of did not cause prejudice to the first respondent. Mr Nyamayemombe referred the court to the case of *Apostolic Faith Mission in Zimbabwe* v *Apostolic Faith Mission of Zimbabwe and Others*[3], where the court condoned the defect of the wrong date endorsed on the certificate of urgency.

The first respondent also raised a further point in *limine* to the effect that the urgent chamber application is not accompanied by the appropriate form. In response, the applicant maintained that it has complied with the Rules and also alleged that the first respondent has failed to lay out the prejudice that it will suffer as a result of failure to comply with the rules. The first respondent abandoned this point *in limine* on the hearing day.

Thirdly, the first respondent also argued, as a point *in limine* that the applicant did commit an act of material non-disclosure by failing to disclose that the first respondent is the owner of the property in question. The first respondent additionally argued that the applicant only casually referred to the first respondent as the owner of the property in para 33 of the founding affidavit. According to the first respondent, the applicant should have stated this fact from the beginning of the urgent chamber application. In support of the averment, the

[1] SC12/13.

[2] HH409/21.

[3] HH254/22.

first respondent attached the deed of transfer which confirms that the first respondent is the owner of the property. In response, the applicant asserted that it remains a beneficial owner of the property by virtue of the lease agreement.

The first respondent also asserted that the applicant failed to disclose that Sensene Investments (Private) Limited is the owner of the remainder of Odar Farm. The first respondent also attacked the present application for failing to disclose that in the *Constitutional Court matter of Zimbabwe Tobacco Association and Minister of Lands and Rural Resettlement* under case number CC51/13, the parties therein reached a settlement of their differences with respect to the properties in Odar Farm. In support of the affirmation, the first respondent annexed to the opposing affidavit, the appropriate correspondence dated 9 December 2014, the memorandum of agreement and the deed of settlement both of which were concluded by the parties to the aforesaid Constitutional Court matter. The first respondent also claimed that Sensene Investments (Private) Limited, in terms of Clause 2.3 of the memorandum of agreement, was to dispose of the stands and get compensation from the purchasers.

In response, the applicant contended that the factors as presented by the first respondent were not within the personal knowledge of the deponent to its affidavit and hence could not be expected to disclose such facts. Furthermore, the applicant maintained that the deponent stated in the founding affidavit facts which were within his or her personal knowledge and other relevant factors. The applicant alleged that it remains the holder of the valid lease agreement which has not been cancelled.

Fourthly, as an additional point *in limine*, the first respondent argued that the applicant lacks substantial interest in the matter and hence the applicant lacks *locus standi*. Mr Matimba argued that the interest of the applicant is of financial nature which does not qualify to be substantial interest. He referred the court to the case of *Burdock Investments P-L* v *Time Bank of Zimbabwe Limited*[4].

The applicant, in response, argued that it has substantial interest in the matter as its structures erected on the disputed property will be demolished if it does not take action by filing the present application. The applicant will be evicted and hence the applicant has substantial interest. The applicant, through Mr. Nyamayemombe argued that the interest of the applicant

[4] HH194/03.

also arises as a result of the lease agreement between the applicant and the first respondent who has chosen not to oppose the present application. Furthermore, the applicant counsel also argued that the applicant has been in occupation of the disputed property since 2012 to date which also gives rise to substantial interest in the matter.

Fifthly, the first respondent affirmed, by way of a further point *in limine*, that the present matter is not urgent. It argued that the present urgent chamber application was served on its legal practitioners on the date of ejectment being 7 November 2022. Furthermore, the first respondent maintained that its legal practitioners communicated by way of correspondence dated 7 November 2022 that the property in dispute was excluded from the writ of ejectment. According to the first respondent, the present application must not be deemed to be urgent as the matter was prematurely brought before the court.

In responding to this point *in limine*, the applicant averred that the matter remains urgent. It also alleged that the letter by the first respondent's legal practitioners does not stay execution of judgment as the first respondent can change its mind at any time and instruct the first respondent to execute the judgment without any further notice to the applicant. The applicant also asserted that the present application cannot be disposed of by way of ordinary court application as doing so would cause prejudice to the applicant.

Sixthly, the first respondent also raised a further point *in limine* of prescription. According to the first respondent, the property in question was transferred to the first respondent on 8 July 2015. The first respondent additionally argued that any claim on the property has prescribed. On the date of hearing, the first respondent's counsel did not persist with this point *in limine* which led me to conclude that he was no longer pursuing this point *in limine*.

Lastly, the first respondent also asserted, by way of a further point *in limine*, that the applicant did not aver the basic requirements of the urgent chamber application, that is to say, *prima facie* right, balance of convenience and whether or not the applicant has other remedy at its disposal. The first respondent contended that the applicant cannot claim to have a *prima facie* right when it is apparent that the first respondent is the owner of the property in dispute. The first respondent maintained that the balance of convenience test is in favour of the first respondent. It is the first respondent's case that the applicant has alternative remedy

as it may sue the first respondent or the fifth respondent for damages as a result of the ejectment.

In response, the applicant asserted that the applicant has established a *prima facie* right by virtue of the fact that it has a valid lease agreement and that the applicant is in occupation of the property and has erected structures thereat. Consequently, the applicant argued that the balance of convenience favours the granting of the present application under such circumstances in order to allow the finalisation of the application for joinder and rescission of default judgment filed under case number HC 7415/22.

On the date of hearing, the first respondent did not persist with this point *in limine* presumably after going through the answering affidavit which responded to these issues raised by the first respondent. I was forced to reach the conclusion that the point *in limine* concerned was abandoned by the first respondent, therefore. If my assumption is wrong, this point *in limine* will be addressed when I am dealing with the merits of the matter. Thus, no prejudice will be suffered by the first respondent in the circumstances.

With respect to merits, the first respondent also opposed the present application based on various factors. The first respondent alleged that it bought the property from Sensene Investments (Private) Limited on 14 August 2017. At the time of the purchase of the property in question, the first respondent was not aware that the applicant has any rights to the property. The first respondent also argued that the applicant does not have substantial legal interest in case number HC 5790/22. The first respondent also affirmed that although the applicant may have financial and personal interest in the matter, this does not translate to substantial legal interest. According to the first respondent, the rights of the applicant were extinguished by the aforesaid memorandum of agreement and the deed of settlement concluded. The first respondent insisted that it is a *bona fide* purchaser and is unnecessarily incurring costs by being dragged before the court.

The first respondent claimed that the application for joinder and rescission of default judgment filed under case number HC 7415/22 has no merits just like the present application. The first respondent alleged that it has no knowledge of the fact that the applicant got the property in question from the fifth respondent. The first

respondent also maintained that the lease agreement issued in favour of the applicant is not superior to the rights of the first respondent.

The fourth respondent, through its counsel, Ms Gowero, did not oppose the application. The counsel only appeared on the initial hearing day and did not appear on the subsequent hearing day.

I will now address points *in liming* raised by the first respondent. After abandoning some of the points *in limine*, the court is now left with four points *in limine*, that is to say, points *in limine* related to the urgency, certificate of urgency, material non-disclosure and lack of substantial interest in the matter.

I will start by dealing with the point *in limine* where the first respondent highlighted that the certificate of urgency is fatally defective. It is apposite to highlight at this juncture that the certificate of urgency is of great magnitude as it guides the judge in determining whether or not the matter is urgent. Our jurisprudence has, over a period of time, established that the certificate of urgency is of great consequence in urgent chamber applications. In the case of *Nyakudya* v *Vibranium Resources (Pvt) limited* (*supra*), the court held that:

> "A certificate of urgency assists the court in its determination of whether or not a matter is urgent. In *Condurago Investments (Pvt) Ltd* v *Mutual Finance (Pvt) Ltd* HH 630/15 the court underscored the importance of a certificate of urgency in the following words;
> "An urgent application is an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue. That indulgency can only be granted by a judge after considering all the relevant factors and concluding that the matter cannot wait. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188.
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> The need for the certificate of urgency is therefore meant for the benefit of the generality of the hapless litigants who are about to be jumped in the queue but cannot speak for themselves because they are never consulted or given an opportunity to object. For that reason there is need for a judge to proceed with caution and due diligence so that justice may be done and be seen to be done. According to the well-established dictum of *Curlewis* in *R* v *Heerworth* 1928 AD 265 at 277, a judge must ensure that, "justice is done"

To assist the judge in his difficult task in dispensing justice at short notice and in the heat of the moment r 244 provides him with the benefit of the opinion of an officer of the court a trained legal practitioner who will have had the opportunity to peruse the case

beforehand and formulate an opinion regarding the urgency of the matter. The certifying lawyer therefore carries a heavy responsibility in which he guides and provides assistance to the presiding judge. That duty must be discharged conscientiously with due diligence and due attention to the call of duty.

Furthermore, in the case of *Chidawu and Others* v *Sha and Others* (*supra*) the Supreme Court beautifully remarked as follows:

> "It follows that the Certificate of Urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required to consider the papers forthwith and has the discretion to hear the matter if he or she forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the judge is guided by the statements in the certificate by the legal practitioner as to its urgency. In this exercise the court is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant."

In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts. GILLESPIE J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in *General Transport & Engineering (Pvt) Ltd& Ors* v *Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301, where he stated:[5]

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name.
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> ……It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably

[5] At pp 302E-303B

> entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."

The certificate of urgency is provided for by Rule 60(6) of the High Court Rules, 2021 published in Statutory Instrument 202 of 2021(hereinafter called "the High Court Rules") which provides as follows

> "Where a chamber application is accompanied by a certificate from a legal practitioner in subrule (4)(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith."

In terms of Rule 60(6) of the High Court Rules, it is obvious that the purpose of the certificate of urgency is to specify the urgency of the matter filed and the reasons therefor. The effect of Rule 60(6) of the High Court Rules is that every urgent chamber application, where the applicant is represented, must be accompanied by the certificate of urgency. In the absence of the certificate of urgency under such circumstances, the Registrar will not refer the urgent chamber application to the Judge.

In *casu*, the certificate of urgency states that the applicant is on the verge of being evicted as a result of the court order. The certificate of urgency also states that the ejectment will see the destruction of the school erected on the disputed property which will result in irreparable harm to the applicant if the execution of the court order under case number HC 5790/22 is not stayed. In the certificate of urgency, it is also stated that the applicant was not a party to the proceedings which led to the court order of ejectment and that the applicant only became aware of the order on 2 November 2022 five days before the proposed date of ejectment. These facts, in my view do establish matters that are of urgency. I consider these facts as constituting reasons for urgency contemplated in Rule 60(6) of the High Court Rules. In this regard, I consider that the certificate of urgency substantially complies with the provisions of Rule 60(6) of the High Court Rules. The issue of ownership of the disputed property raised by the first respondent is not relevant to the issue of urgency envisaged by Rule 60(6) of the High Court Rules.

The first respondent also attacked the certificate of urgency for bearing a wrong date. I am persuaded by the submission by the applicant that the application was prepared in an urgent manner which saw some typographical errors being committed as a consequence. The applicant also went on to apply for condonation and requested for leave to amend the certificate of urgency. Although this error demonstrates a level of lethargy by the applicant, the error is the one condonable especially where there is sufficient explanation for the error and where there is no prejudice to the other party. In my view, the wrong date on the certificate of urgency is nothing more than an error. In the case of *Apostolic Faith Mission in Zimbabwe* v *Apostolic Faith Mission of Zimbabwe and Others*, (*supra*) the court, in relation to the certificate of urgency which had similar errors, made the following observations:

> "The applicant explained that the dates stated in the original certificate were a result of a typographical error. On the other hand, the respondents stated that they had prepared their opposing affidavits based on the certificate urgency as presented to them. While I note that there was indeed a measure of tardiness involved, it is clear that the dates stated could only be erroneous. The certificate of urgency mentioned in the first paragraph that the lawyer who prepared it had considered the contents of the founding affidavit and the annexures thereto. These documents relate to 2022 events, which means that there was clearly a misstatement of the dates. The fact that the respondents had already prepared their opposing affidavit based on that certificate is a challenge that would have been resolved by the filing of a supplementary affidavit. When I stood down the hearing of the matter to 2:30 p.m. I also granted the respondents leave to file a supplementary affidavit to respond to the applicant's papers as amended if they so wished. They elected not to file any supplementary affidavit. In the premises, the objection to the filing of the amended certificate of urgency is dismissed."

In the present application, the first respondent did not specify the nature of prejudice that it suffered as a result of the errors of dates. In the circumstances, I saw no merit in the point *in limine*. I accordingly granted the applicant leave to amend the certificate of urgency. Consequently, the amended certificate of urgency is deemed to be part of the record. As a result, I dismiss the point *in limine* concerned.

With respect to urgency, it is evident that our jurisdiction has settled on what constitutes urgency in a plethora of cases. In the case of *Kuvarega* v *Registrar-General & Anor*[6], it was stated that:

[6] 1998 (1) ZLR 188 (HC).

> "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."

In *casu*, it has not been disputed by the first respondent that the applicant had no knowledge of the ejectment order prior to 2 November 2022. The applicant filed the present application within five days of having knowledge of the judgement for ejectment. In my view, the applicant sprang to action according to logic and common sense within the reasonable time as envisioned in the case of *Gwarada* v *Johnson & Ors*[7], where it was stated as follows:

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be."

The applicant must demonstrate that the situation which he or she is seeking to arrest may become irrevocable if the court does not intervene. In the case of *Documents Support Centre (Pvt) Ltd* v *Mapuvire*[8], the court commented as follows:

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In *casu*, if this court does not stay execution prayed for by the applicant, the school erected at the disputed site would be destroyed. The destruction of such school can only be reversed or revivified through miraculous powers.

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[7] HH 91/09.

[8] 2006 (2) ZLR 240 (H).

It is also apposite that the applicant must expeditiously approach the court for the matter to be treated as urgent and for the applicant to get preferential treatment. The applicant must not make a last minute rush to the court as doing so would demonstrate the applicant's attitude of lassitude which cannot be tolerated by the court. Zhou J, in the case of *Apostolic Faith Mission in Zimbabwe* v *Apostolic Faith Mission of Zimbabwe and Others*, (*supra*) made the following seminal remarks:

> "In the case of *Dilwin Investments (Pvt) Ltd* (*supra*) at p 1, GILLESPIE J, emphasized that a party who institutes proceedings through the urgent procedure is essentially seeking preferential treatment from the court in that he or she or it is seeking to jump the long queue of other applications waiting to be heard. For this reason, the court expects such a litigant to act expeditiously having regard to when the need to act arose. In dealing with this need to act expeditiously in the *Kuvarega* case, the court held that urgency which stems from deliberate inaction until the event complained of materializes is not the sort of urgency for which the rules extend the preferential treatment of an urgent hearing. If a party waits until the eleventh hour the court will not drop down everything to attend to the self-inflicted urgency."

As highlighted before, the applicant instituted the present proceedings within five days of having knowledge of the court order under case number HC 5790/22. This, in my view, is in compliance with the requirements as set out in the case of *Apostolic Faith Mission in Zimbabwe* v *Apostolic Faith Mission of Zimbabwe and Others* (*supra*). I therefore dismiss the point *in limine* related to urgency raised by the first respondent for want of merits.

I now turn to the point *in limine* of material non-disclosure. Our courts have emphasised the need for material Disclosure in a number of cases. In *Graspeak Investments (Pvt) Ltd* v *Delta Operations (Pvt) Ltd and Another*[9], the court held that:

> "an urgent application is an exception to the *audi alteram partem* and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosure, mala fides or dishonesty…"

Furthermore, in the case of *Sergeant Mhande 04737T and Another* v *The Chairman of the Police Service Commission and Others*[10], The court postulated the following pertinent comments:

[9] 2001 (2) ZLR 551 (H)

> "That deliberate attempt to withhold information does not project the applicants in good light. Our courts are not keen to grant favourable orders to litigants who withhold vital information to it."

NDOU J, in the case of *Anabus Services (Pvt) Ltd* v *Minister of Health and Others*[11], superbly remarked as follows:

> "The courts should in my view always frown on an order whether *exparte* or not sought on incomplete information. It should discourage non-disclosure, *mala fides*, or dishonesty."

What is key to note is the fact that material non-disclosure must have been motivated by a *mala fide* intention or a scheme of deception. The first respondent admits that in para 33 of the founding affidavit, the applicant avers that the first respondent is the owner of the property in dispute. However, the first respondent insisted that this is not enough as the applicant was expected to have stated this fact from the beginning of its affidavit. The relevant portion of para33 of the founding affidavit is as follows:

> "….. The Lease agreement was never validly cancelled and it comes as a shock to Applicant that First Respondent allegedly has title Deeds to the property."

It is clear that the applicant averred in its founding affidavit that the first respondent has got the registered title to the property in question. That should not be deemed as a material non-disclosure for that purpose, in my considered view.

It is the applicant's case that some of the facts particularly the history of the dispute which culminated into the deed of settlement at the Constitutional Court were outside the circumference of the deponent's knowledge at the time of preparing the present application. The first respondent has not advanced grounds for its belief that the applicant had the relevant knowledge of the history of the dispute at the material time. In the absence of such information, I am persuaded by the applicant's version that it had no knowledge of material

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[10] SC63-18.

[11] HB88-03

information at the appropriate time. In my view, that non-disclosure by the applicant cannot be due to *mala fide* intent or a ploy of duplicity. In any event, it is apparent that the applicant was not a party to the Constitutional Court case. Expecting the applicant to disclose the facts of such case with exactitude would be unreasonable.

Consequently, I see no merit in the point *in limine* which is related to material non-disclosure for the reasons aforesaid. Therefore, the point *in limine* concerned is hereby dismissed.

The first respondent also raised a further point *in limine* to the effect that the applicant lacks substantial interest in the matter. In the case of *Burdock Investments P/L* (*supra*) relied upon by the first respondent's counsel, Mr Matimba, the court opined as follows:

> "It appears to me from the authorities that the courts have evolved certain principles to guide on what constitutes direct and substantial interest, sufficient to ground locus *standi* in certain circumstances. A convenient starting point in reviewing the authorities may be the case of *Morgan and Another* v *Salisbury Municipality* 1935 AD 167. In that case it was broadly laid out that joinder and therefore *locus standi*, could be demanded as of right in cases of joint ownership, partnerships, joint contractors and in all cases where there was is a joint financial or proprietary interest. While the list of situations where joinder is a right a laid out in the case has since been held not to be exhaustive, the principle that there are situations where joinder can be demanded as of right has not been challenged. The broadly laid out principle was affirmed in *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637 (AD) and in *Sheshe* v *Vereeniging Municipality* 1951 (3) SA 661. It was in the *Sheshe* case that it was recognised that the court has discretion to grant joinder in cases other than those laid out in the *Morgan* case. In my view, in the cases listed in the *Morgan* case, *locus standi* is not an issue for debate but follows as of right from the joint legal relationship between the parties. The jurisprudential justification for this principle is in my view, not hard to find. It lies in the fact that any decision affecting the rights of one necessarily affects the right of the other because of the special legal relationship between partners and joint owners or contractors. Proceeding to issue a judgment in such cases in the absence of a partner or a joint owner or contractor will offend against the *audi alteram partem* rule in respect of the party not joined as a decision will be made against such a party's rights without affording him or her a chance to be heard. It is trite that a court may not make an order that will affect a party that is not before it."

To me arguing on the issue of substantial interest may be premature at this stage. This argument will be relevant at the time when the court is considering the application for joinder and rescission of default judgment under case number HC 7415/22. Making a determination on this aspect at this stage will pre-empt the decision of the court under case number HC

7415/22. It is not appropriate for me to address the merits of the matter which is before the court. I, therefore dismiss the point *in limine* concerned.

I will turn to the merits of the present application. The sole issue for determination is whether or not the present application meets the test of the Provisional Order contemplated by the Rules as developed by the case law.

It is pertinent that the applicant for the Provisional Order must satisfy four requirements namely:

1. Existence of a *prima facie* right though open to doubt.

2. A well-grounded apprehension of irreparable harm.

3. The absence of any other satisfactory remedy.

4. That the balance of convenience favours the applicant.

See *Setlegelo* v *Setlogelo*[12] *and Flame Lilly Investments Co.* v *Zimbabwe Salvage (Pvt) Ltd*[13].

In *casu*, the applicant averred that it has been in occupation of the property since 2012. The first respondent has not disputed that the applicant erected a structure at the disputed site. According to the applicant, this structure is the school of sign language. It is also clear that the applicant did occupy the property by virtue of the lease agreement concluded between itself and the fifth respondent which, at least, suggests that it is a *bona fide* occupant. In the circumstances, I am of the view that the applicant has established a *prima facie* right.

With respect to irreparable harm, it has been submitted on behalf of the applicant that the school of sign language will be difficult to rebuild if the first respondent is allowed to go ahead with ejectment process. According to Mr Mlauzi, who submitted for the applicant, if the school is destroyed efforts to realise and promote sign language which is one of the officially recognised languages in terms of s 6 of the Constitution will be drastically affected. I do agree with the applicant's submissions in this regard. Pending the finalisation of the

[12] 1914 A.D. 221.

[13] *1980 ZLR 378.*

application for joinder and rescission of default judgment, it is just and fair that the execution of judgment be stayed in order to prevent irreparable harm.

The applicant correctly averred that there is no other satisfactory remedy which can redress its situation with similar results. If this matter is to be brought by way of an ordinary court application, the third respondent may execute the judgment under case number HC 5790/22 at any time. The first respondent had argued that there was no need for the present application since the first respondent had agreed to remove the property in dispute from the properties which are going to be affected by the writ of ejectment. This is only a temporary measure. The first respondent can change its mind any time and decide to execute the judgment without any further notice. Only an order of the court may be able to adequately harness the situation up to a predictable period. Without this protection, the applicant and its members may have sleepless nights fearing for the unknown future.

With regard to the balance of convenience, the applicant submitted that the test for the balance of convenience favours the granting of the present application. Given that the first respondent is not disputing that there is a structure at the disputed property, in my view, the dismissal of the present application may not be in the best interest of the balance of convenience test as this may see the annihilation of the structures at the disputed property through the enforcement of the writ of ejectment.

It is important for me to examine prospects of success of the pending application for joinder and rescission of default judgment. This is significant as this court is loath in granting the present application which is dependent upon the outcome of the application for joinder and rescission of default judgment filed under case number HC 7415/22. The applicant submitted that the application for joinder and rescission of default judgment does have some prospects of success. On the other hand, the first respondent argued that there are no prospects of success given that the applicant does not have a substantial interest in the matter.

It is not in dispute that the applicant erected a structure at the disputed property. Given such set of surrounding facts and circumstances, the applicant may, at least, be entitled to claim compensation if the first respondent is going to, thereafter, persist with the ejectment of the applicant from the property. It is pertinent to note that the first respondent, by alleging that the applicant's interest in the matter is of financial character, the first respondent has indirectly recognised the possibility of the applicant's right to compensation. This

endorsement is a sign that the first respondent does realise that, at least, the case of the applicant enjoys some prospects of success, to a certain degree. It is apparent that the financial interest of the Applicant alleged by the first respondent cannot be determined by way of the present application. It has to be determined by means of other processes. Consequently, it is just and fair that applicant be allowed to prosecute its application for joinder and rescission of default judgment filed under case number HC 7415/22 which presents a reasonably arguable case.

In the premises, the present application is merited. The Provisional Order prayed for must be granted to allow the determination of such application and such other rights of the applicant.

Accordingly, the Provisional Order be and is hereby granted.

M C Mukome Legal Practitioners, applicant's legal practitioners.
Matipano & Matimba, first respondent's legal practitioners.