NALDLINE (PRIVATE) LIMITED
t/a EXODUS ENGINEERING & EQUIPMENT
versus
HARARE RESIDENTS TRUST
and
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT & PUBLIC
WORKS & NATIONAL HOUSING
and
MINISTER OF PRIMARY & SECONDARY EDUCATION
and
THE SHERIFF OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 29 June & 12 July 2022

Urgent Chamber Application

Mr V Chivore, for the applicant
Mr P B Saurombe, for the 1st respondent
Mr R Zinhema, for the 2nd respondent
No appearance for 3rd, 4th and 5th respondents

MUCHAWA J: This is an urgent chamber application in which the applicant seeks the following relief in its draft order;

"TERMS OF FINAL ORDER SOUGHT

a) Confirmation of the provisional order
b) An order that consent issued by the 2nd respondent in case No. HC 4285/21 cannot be validly enforced against the applicant
c) 1st respondent to pay costs on a higher scale

INTERIM ORDER

That you show cause to this Honourable Court, why an interim order should not be made in the following terms:

a) A declaration that the applicant entered into a duly valid and binding agreement of sale with the 2nd respondent on the 4th October 2017 as such, 2nd respondent cannot make any concessions on the property it sold to applicant without its consent.

b) It be declared that, applicant was not party to proceedings filed under cases HC 5420/20 and 4285/21, as such the court orders in those matters cannot be enforced against it."

The brief background facts to this matter are that the applicant entered into a Memorandum of Agreement with the second respondent on 18 August 2015 in terms of which it was allocated land, being stand 2166 of 1042 Tynwald South for the development of ninety housing flats. This agreement was amended on 4 October 2017 to increase the number of housing flats to one hundred and twenty. A further amendment was affected to the agreement on 9 June 2018 wherein the land initially allocated to the applicant was sold to it and the full purchase price of US$414 000.00 was paid. In terms of the amended agreement, the applicant was to construct one hundred and twenty residential flats on the property and sell them to people on the housing allocation list of the second respondent and individual title deeds would then be issued. Further, the applicant was to construct two classroom blocks at Yemurai Primary School in Dzivarasekwa. The applicants allege that it met all the publication requirements which call upon interested parties to lodge objections to any proposed developments.

The applicant claims that it has been in the process of meeting the conditions of the agreement in terms of the developments on stand 2166 in conformity with approved plans. On 25 April 2022, it is averred that the first respondent's representatives attended at the applicant's premises at stand 2166 and harassed the applicant's staff members and contractors and chased them away from the premises on the strength of a court order obtained under case HC 5420/20 in which the applicant had not been a party. On 6 May 2022, the applicant issued summons seeking to interdict the first respondent from its conduct of disrupting and interdicting the applicant from its construction work as the order in HC 5420/20 dealt with stands 2164 and 2165 and not applicant's stand 2166. It is then that the applicant learnt that there was another court order issued under case HC 4285/21 which also covered stand 2166 which had been granted by consent. It was ordered that the developments and construction on stand 2166 Tynwald South be immediately ceased. The applicant then withdrew the summons in case HC 3003/22 on 1 June 2022. It is alleged that upon investigations and inquiry with the second respondent on 3 June 2022 by way of a letter as to how an order had been entered by consent in a matter in which it was not a party affecting its rights to stand 2166 without being informed, there was no response. A meeting was then held on 14 June

2022 and the second respondent is alleged to have said it had acted in error. The applicant then issued a second set of summons under case HC 3637/22. This matter is still pending.

The current application was filed on 17 June 2022 and it is opposed. The first and second respondents raised points in *limine* which I heard and reserved my ruling. This is it and I deal with each point in turn below.

Whether the matter is urgent

Mr Saurombe submitted that the certificate of urgency is fatally defective as it simply restates the basis for the application for a declaratory order but fails to address the requirements of urgency. It is alleged that the certificate of urgency does not establish the prejudice and irreparable damage that will be suffered if the order sought is not granted. It was explained that there is in fact no prejudice to be suffered by the applicant if it abides by the order in case HC 4285/21 which is not a final order prohibiting development permanently, but an interim order protecting the land pending issuance of a final judgment in HC 5420/20. It was contended that the applicant will not suffer any prejudice if it simply vacates the land and suspends developments on stand 2166.

Furthermore, it is alleged that the urgency in this case is self-created as the applicant has lodged the application because representatives of the first respondent informed the applicant that it will enforce the consent order and writ of ejectment if it continues to develop in contempt of the court order. The applicant is said to have continued to develop despite such warning. Any arising financial damage to the applicant due to enforcement of the order and writ would therefore be self-created, it was argued.

In terms of the time factor, it was submitted that the applicant did not act promptly when the need to act arose as it first waited seven years from 2015, the date of the agreement of sale to develop the stand then waited two months from 25 April 2022 when it first became aware of the interim order in HC 5420/20 and yet another month from becoming aware of the consent order in HC 4285/21 on 20 May 2022. The applicant is accused of using frivolous proceedings without first seeking suspension of the writ and rescission of the order.

Mr Chivore submitted that the time factor should only be reckoned from the date the applicant became aware of the court order relating to stand 2166 and not earlier. From then he related what is already laid out in the background about the investigations, meeting with the second respondent and filing of court actions. Since the meeting with the second respondent was held on

14 June 2022 and the application was filed on 17 June 2022, it was argued that the applicant acted when the need to act arose.

On the certificate of urgency alleged defects, *Mr Chivore* referred the court to para(s) 7 and 8 on p 7 of the application to argue that the prejudice is evident as the sheriff has already served notice and what is left is enforcement.

In providing a certificate of urgency, the applicant acted in line with r 60 (4) (b) and r 60 (6) of the High Court Rules, 2021.

The role of a legal practitioner who certifies a matter as urgent was covered in the case of *Kambarami v Kambarami* HH 419/15 wherein TSANGA J said'

> "What emerges from the above is that the bottom line is that the certificate must contain the reasons for the urgency to justify the Registrar placing the matter before the judge in the initial instance. The judge may then call upon the other party to make representations on urgency before making any decision. As stated in the *Kuvarega* case above, central to the assessment of urgency is that "a matter is urgent, if at the time the need arises, the matter cannot wait". That is the crucial test that is a fact based assessment. The facts of each particular case are what a practitioner uses to determine urgency.---------- Indeed his role is to apply his analytical skills to those facts with the primary aim of distilling the urgency and the core message that needs to be communicated to the court as his as the receiver of the nature of that urgency."

In *Chidawu & Ors* v *Shah & Ors* SC 12/13, the same position was stated 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."

The question is whether the certifying legal practitioner put out enough facts in his certificate of urgency assuring the court that the matter should be treated urgently. In para 7 this is what is stated,

> "The applicant is now at the mercy of having a court order which materially affects its rights being enforced against it yet it was never part of any proceedings which led to the order being obtained. The applicant was never granted an opportunity to present her side of the case. It is trite that a court order cannot be enforced against a party who was not cited in the proceedings or a party that has a material interest in the proceedings."

In para 8 the certificate continues;

> "The 5th respondent has to date already served a notice of ejectment, which the applicant never saw, possibly because of the size of the property in issue. The 5th respondent can return at any time now to enforce the court order obtained under case HC 4825/21. It is on this basis, the matter requires to be determined on an urgent basis. The applicant has established a strong case and basis why the order should not be enforced at this material time."

In *Kuvarega* v *Registrar General & Anor* 1988 (1) ZLR 188 (HC) what needs to be covered in a certificate of urgency was canvassed as follows;

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first respondent on 13 February 1998 that people would not be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

The certificate of urgency is not explicit on the prejudice to be suffered if the matter was not heard urgently. All it says is that execution is imminent. It would have been helpful to state what effect this would have on the applicant in relation to the terms of the order to be enforced. A perusal of the order in HC 4285/21 shows that all the applicant is asked to do is to vacate and stay all developments and construction on stand 2166 pending the hearing and final determination of case HC 5420/20.

Engaging with the timelines would also have better assisted the court. The certificate does not explicitly state the date when the applicant became aware of the order in HC 4285/21. It does not explain the delay in acting, from that date which should have been sometime after 6 May when the initial summons were issued out by the applicant. It does not put the court into confidence as to why, the applicant which was legally represented opted to first file two sets of summons (first on 6 May 2022 and then on 1 June 2022) before launching this application particularly as the summons in HC 3637/22 seek more or less the same relief as *in casu.* The applicant does not seem to have treated this matter urgently and only acted through this urgent application as an afterthought.

I agree that the issue of time cannot be reckoned from 25 April 2022 when the first respondent's representatives presented the court order in HC 5420/20 which did not cite the applicant nor deal with stand 2166. Note is taken of the applicant's earlier summons under case HC 3003/22, in which it was sought to interdict the first respondent from its conduct of attempting to interdict the applicant's construction work. It was only in response to these summons that the applicant learnt of the consent order in HC 4285/21 leading to the withdrawal of the HC 3003/22 summons. This was on or about 1 June 2022 on which date separate summons in case HC 3637/22 were issued. Thereafter the applicant embarked on investigating how the order under HC 4285/21 had been entered into and filed this application on 17 June 2022. If the applicant had been able to issue summons based on the same facts and for the same relief, should it not have used this route first?

The statements by the legal practitioner who certified the matter as urgent are insufficient to make the court leave its other business in order to deal with this matter which is already before the court through a summons action.

Further, the applicant did not act as soon as the need to act arose. This appears to be self-created urgency.

I find that the matter is not urgent. There is no basis on which to deal with the rest of the points in *limine* raised.

I accordingly strike this matter off the roll of urgent matters with costs, in terms of r 60 (18) of the High Court Rules, 2021.

Chivore Dzingirai, applicant's legal practitioners
Zimbabwe Lawyers for Human Rights, first respondent's legal practitioners