SHINGAI SIRAHA
versus
GURUVE RURAL DISTRICT COUNCIL
and
MESSENGER OF COURT N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 18 September 2019 & 30 January 2020

Urgent chamber application

T Sengwayo, for the applicant
R Kunze, for the first respondent
No appearance, for the second respondent

CHINAMORA J: After normal court hours on 19 December 2019, the applicant filed an urgent chamber application which was placed before me as I was the duty judge. The certificate of urgency and founding affidavit disclosed that the second respondent, the messenger of court, was due to evict the applicant from the house he occupied the following day at 8.30 am. I caused the registrar to set down the matter for hearing at 3.00 pm on 20 December 2019. In addition, I issued an interim directive interdicting the second respondent from carrying out the scheduled eviction pending my determination after the hearing of the matter. At the time I issued the interim directive, I had not formed any opinion on the issue of urgency or the merits of the application, but had acted *ex abundante cautela* to prevent execution taking place before hearing the respective arguments of the parties.

When the parties appeared before me, I dismissed the application after hearing argument as the applicant had failed to satisfy the requirements for the relief of the interdict that he was seeking. Mr *Sengwayo* also conceded, quite rightly in my view, that his client's case lacked merit. Both Mr *Sengwayo* and his client (Mr Siraha, who was in attendance), pleaded to be allowed time to vacate the disputed property. As a result, I incorporated into my order a clause suspending execution till 27 December 2019, because Mr *Sengwayo* and his client indicated that it would be massively

inconvenient for the applicant to move out before Christmas. The applicant's decision to appeal, therefore, comes as a surprise. Be that as it may, I now give the reasons for my decision.

Factual background

The applicant asserted that he is the owner of the house at Guruve RDC staff quarters, Shinje Township, which he alleged to have purchased from the said council on a rent-to-buy basis. The applicant was employed by the first respondent as a civil technician from September 2009 until 5 August 2016 when his was terminated. Aggrieved by this, the applicant filed an application for review of the decision at the Labour Court, which application was dismissed for lack of merit on 27 April 2018. The first respondent, in consequence, instituted proceedings at the Magistrate's Court for the applicant's eviction. The applicant averred that it was a term of his contract of employment that he would purchase the property on a rent-to-buy basis and that he was paying off the house at the rate of $70-00 per month. No contract of employment containing this alleged right to purchase was produced by the first respondent either in Magistrate's court or as an attachment to the urgent chamber application. The applicant's claim for eviction was successful. Again, dissatisfied with the outcome, the applicant appealed to the High Court under CIV "A" 340/18. When the matter was due for hearing on 10 October 2019, the applicant withdrew the appeal. The applicant's explanation for the withdrawal of the appeal was that, the parties agreed to engage in settlement negotiations. He alleged that he was owed $75 000-00 in unpaid benefits, and the negotiations would lead to that amount being set off against the purchase price of the house.

The first respondent opposed the application and its version was that the house is question belonged to the council, and that the applicant had right of use during the currency of his employment. The first respondent asserted that, as the applicant's employment had come to an end, it was entitled to institute a *rei vindicatio* to recover possession of its property. It further stated that, despite noting an appeal (under CIV "A" 340/18) against the judgment granting it an eviction order, the applicant had not prosecuted the appeal, but withdrawn it. The first respondent denied that the withdrawal was a result of an agreement between the parties to settle the matter. On the contrary, the first respondent attached an email written on 8 October 2019 by Mr Borerwe of Ngwerume Attorneys (applicant's then legal practitioners) to the first respondent's lawyers, in which the following appears:

> "As I alluded, I have had an introspection with client and I have explained the futility of pursuing the above appeal and the costs that may arise from pursuing such. As a result we intend to withdraw the matter and if you are amenable each party would bear its own costs. In the same breath and as per our conversation it is my firm belief, which belief I have highlighted to client that any other litigation pertaining to his retrenchment is again another exercise in futility".

Consequently, the first respondent averred that the applicant was obliged to vacate the house he occupied. The first respondent contended that, there being no appeal pending, the applicant not having vacated its property, it was entitled to evict. In addition, the first respondent raised a point *in limine* that the application was not urgent and should fail on that basis.

This is the factual conspectus which provides a background to the urgent chamber application I dealt with on 20 December 2019.

The applicable law

The object of an urgent chamber application is to get interim protection. The test as to what constitutes urgency was articulated in the case of *Kuvarega* v *Registrar General* 1998 (1) ZLR 188 at 188G-H by CHATIKOBO J as follows:

> "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 deadline 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 delay …"

In other words, what CHATIKOBO J's remarks mean is that for a litigant to be allowed to bypass the normal court roll and obtain urgent relief, he or she has to act timeously in a manner that demonstrates that he or she has treated the matter as urgent. In this context, it should be borne in mind that there are two aspects to urgency. The first aspect is urgency in respect of time or imminence of the harm sought to be prevented, which the learned judge related to in *Kuvarega v Registrar General supra*. The second aspect is urgency in respect of consequence which was clarified in *Triple C Pigs (Partnership) & Anor* v *Commissioner General ZRA* 2007 (1) ZLR 27 by GOWORA J (as she then was) when she observed:

> "…in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some

> delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render *brutum fumen*."

Thus, in addition to a party acting immediately when the need to act arises, he must demonstrate actual or potential irreparable harm arising from the infringement of the party's legitimate rights or interests. The harm must be of such a nature or magnitude as to require immediate redress, failing which there would be nothing left to redress rendering any eventual relief of mere academic relevance.

In *casu*, the applicant has approached this court for interim relief pending the determination of his application for condonation of late noting of appeal and extension of time within which to appeal. In this respect, the law requires an applicant to establish a *prima facie* right, even if it is open to some doubt; a well-grounded fear of irreparable harm occurring; that the balance of convenience favours the granting of interim relief; that no other effective remedy exists; and that there are reasonable prospects of success on the merits of the main matter. These requirements were enunciated by MALABA JA (as he then was) in *Airfield Investment (Pvt)* v *Minister of Lands and Ors* 2004 (1) ZLR 511 (S) at 517 wherein it was stated as follows:

> "It must be borne in mind that an interim interdict is an extra ordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an application for interim relief must satisfy before it can be granted. In *LF Bashof Investments (Pty) Ltd* v *Cape Town Municipality* 1969 (2) 3A 256 (C) at 267 A-F, Lorbett J (as he then was) said an application for such temporary relief must show:
>
> '(a) that the right which is the subject matter of the main action which he seeks to protect by means of an interim relief is clear or if not clear, is *prima facie* established though open to some doubt,
>
> (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right,
>
> (c) that the balance of convenience favour the granting of the interim relief, and
>
> (d) that the applicant has no other satisfactory remedy".

See also *Setlogelo* v *Setlogelo* 1914 AD 221, *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (1) ZLR 289 (SC)

The arguments by the parties

As I have already stated, in its opposing affidavit, the first respondent raised a point *in limine* that the matter was not urgent. This preliminary objection was persisted with at the hearing of the matter. I asked the parties to address me on both the point *in limine* and the merits whereafter I would make my ruling. The first respondent argued that the matter was not urgent in that the need to act arose around 8 October 2019 when the applicant withdrew his appeal. According to the respondent, that is the time the applicant should have filed the application for stay of execution, yet he only sought this court's intervention some 74 days from the time he should have acted. The old Latin adage appositely says "*vigilantibus non dormientibus jura subveniunt*". Literally translated into English it means "the law helps the vigilant but not the sluggard". (See *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC) at 290. The inescapable conclusion is that the urgency was self-created. In the present case, the applicant did not explain his failure to act timeously either in the certificate of urgency or the founding affidavit. (See *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank (Pvt) Ltd* 1998 (2) ZLR 301 (H); *Kuvarega v Registrar General supra).*

In respect of the merits, the first responded argued that the relief sought by the applicant was not substantiated. The applicant stated that the applicant had not adduced any evidence which entitled him to ownership of council property. Further, the first respondent contended that the applicant had withdrawn the appeal in CIV "A" 340/18 of his own free will and volition, presumably, acting on the advice of his then legal practitioners. In this respect, the first respondent stated that the applicant's failure to obtain a supporting affidavit from the said lawyers on what prompted him to withdraw the appeal is explained in Mr Borerwe's email of 8 October 2019.

In response, Mr *Sengwayo* submitted that he could not take his client's case beyond the applicant's averments on the papers filed of record. Specifically, he conceded that the applicant had not produced any agreement of sale between him and the first respondent upon which a right ownership could be founded. That is when Mr *Sengwayo* and his client pleaded with counsel for the first respondent to be given time to vacate the disputed premises after Christmas as earlier alluded to in this judgment.

It is clear from the foregoing that the applicant did not act immediately when he found himself in a predicament. The need to act arose on 8 October 2019 when the appeal was withdrawn.

From that day, it was evident that nothing short of swift action would stop the first respondent from executing the judgment granted by the Magistrates Court. Significantly, the email of 8 October 2019 does not support the reason proffered by the applicant for withdrawing the appeal. Therefore, the withdrawal remains explained by lack of merit. I was therefore satisfied that the application was not urgent and that the applicant had not established a case for the grant of stay of execution of the warrant of ejectment.

With respect to the merits, the applicant did not attach to his founding papers any salary slip which showed that an instalment towards the purchase price was being deducted from his earnings. It is relevant to mention that this application came before me as an urgent chamber application in terms of Order 32, Rule 244. In this respect, Rule 246 (1) reads as follows:

> "A judge to whom papers are submitted in terms of rule 244 or 245 may –
> (i) require the applicant or deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require".

Despite asking the applicant's counsel and the applicant himself not a single wage slip for the entire period of his employment from September 2009 to August 20016 was produced. There was simply nothing to substantiate the allegation that the property the applicant occupied had been sold to him by the first respondent. Nowhere in his papers does he mention the sale prices. It is settled that for a contract of sale to be *perfecta*, there are 3 essential elements. These were set out in the case of *Warren Park Trust v Pahwaringira & Ors* HH 39-09 as follows: (i) the agreement (*consensus ad idem*); (ii) the thing sold (*merx*) and (iii) the price (*pretium*). It is generally accepted that parties enter into a contract with a view to exchange the thing for a price. Thus, if there is no agreed price, then there is no sale. At any rate, it is highly unlikely that the sale of immovable property belonging to a local authority would be done without a resolution sanctioning such a disposal. Besides, in the absence of an agreement of sale or proof that certain deductions were made from his salary which went towards the purchase of the disputed property, no *prima facie* right had been demonstrated by the applicant which entitled him to the interdictory relief that he was asking for. Guidance is to be found in *Mayor Logistics* v *Zimbabwe Revenue Authority* CCZ 7-14, where the Constitutional Court said:

> "It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it".

As I found that the applicant had failed to go past the first hurdle of establishing a *prima facie* right the matter was resolved, making it unnecessary for me to deal with the other requirements for an interim interdict.

Conclusion

Having considered the documents on record and the parties' respective submissions, I came to the conclusion that, firstly, the matter was not urgent and, secondly, the applicant faced insurmountable difficulties with getting indulgence with condonation for late filing of his appeal. Furthermore, the letter of 8 October 2019 which preceded the withdrawal of the appeal and Mr *Sengwayo*'s concession fortified my view that the application was hopeless. The application for condonation of late noting of appeal and extension of time within which to appeal was undoubtedly filed to provide a basis upon which the application before me could hinge. However, the fact remained that the basis for resisting eviction had not been demonstrated. It was basically a frivolous and frantic effort whose sole purpose was to try and delay the inevitable arrival of the day of reckoning. As regards costs, in light of the concession by Mr *Sengwayo*, albeit made belatedly, in the exercise of my discretion I shied away from acceding to the request for costs on a higher scale which the first respondent had asked for and decided to award costs on the ordinary scale.

Disposition

In the result, I granted the following order:

1. The application is dismissed with costs on an ordinary scale.
2. The interim directive suspending execution is hereby lifted.
3. The applicant to vacate the disputed property by 27 December 2019.

Trust Law Chambers, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners