DAWN FARAI KAMBARAMI
versus
EDGAR TAFADZWA KAMBARAMI
and
THE SHERIFF OF THE HIGH COURT NO. HARARE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 27, 28 & 29 April 2015

Urgent application

O D Mawadze, for applicant
J Samkange & E Samkange, for the 1st respondent
No appearance by 2nd Respondent

TSANGA J: This urgent application is at the instance of the applicant Dawn F Kambarami, a former spouse seeking to put into effect a clause of a consent paper regarding the sale of the matrimonial home, having found a buyer. The first respondent is her former husband Edgar Kambarami. He opposes the application on the grounds that the consent paper has not been properly interpreted. He says it is still within his rights to buy her out since either party was given up to a year to buy the other out in the event of a purchaser not being found "immediately" after the granting of the court order.

On 19 of November 2014 the parties were granted a divorce order by consent in terms of which the consent paper which regulated the distribution of the matrimonial property between them, among other things, was made a part of the divorce order. Regarding the house the first option captured in the consent paper was for it to be sold immediately for a minimum agreed price of $150 000.00. Sharing of the sale price would be split equally once all requisite taxes had been paid. The second option in the event of failure to find a purchaser "immediately", was for either party in light of that eventuality to exercise the option to buy the other out at the agreed price within that one year period. The third option if they failed to buy each other out within the requisite time frame was that the house would then be sold by auction to the highest bidder.

It is some five months now after the divorce order was granted and a buyer has been found for $180 000.00 which is $30 000.00 more than the minimum agreed price of $150

000.00. The applicant seeks an order to compel the respondent to sign the necessary papers to effect the sale. On being notified that a buyer had been found the first respondent wrote a letter to the agent stating that the property was no longer for sale as he wished to exercise his option to buy his wife out.

In his resistance to the sale at this point, first respondent premises his argument on the basis that this purchaser has not come "immediately" after the granting of the divorce order as had been anticipated in the crafting of the consent paper. The essence of his argument is that within the ordinary meaning of the word 'immediately' that time frame has passed and that the consent paper is currently operating within its second optional tier - that of buying each other out.

Points *in limine*

However, the first respondent raises two points *in limine* regarding why the application before me should not be heard on the merits. The first is that part of the interim order sought, in particular paragraph 2, is couched exactly the same as the final order. It reads as follows:

> " 1. Respondent be and is hereby directed to retract in writing to the purchaser and or the concerned Estate Agent, his communication dated the 14th of April 2015 which communication stated that the immovable property namely stand number 16 Lower Hampden Place, Stand Number 903, Marlborough, Harare is no longer on sale.
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> 2. Respondent be and is hereby directed to cooperate with the applicant in having the Agreement of Sale (Annexure G) of stand number 16 Lower Hampden Place, Stand Number 903, Marlborough, Harare, within 48 hours of this order being granted, failing which the sheriff of the High Court of Zimbabwe - Harare or his lawful deputy be and is hereby directed and authorised to sign all the necessary papers on the Respondent's behalf to effect transfer to the purchase."

Clause 2 as captured above stated is reproduced in *toto* as the operative paragraph of the final order. The first respondent objects that in essence what applicant is seeking in the interim order is in fact a final order and as such there would be no need for the applicant to move for the confirmation of the final order since the interim relief would be final. The first respondent relies on cases such *Kuvarega* v *Registrar General & Another* 1998 (1) ZLR 188; *Rolland Electro* v *Zimbank* 2003 (1) ZLR 226 at 227; *and Chikafu* v *Dodhill* 2009 (1) ZLR 293 at 298 for its objection.

There is no need to belabour this point as case law is very clear. As subsequently re-echoed in many other cases, Chatikobo J as he then was, put it thus when he addressed this undesirable overlap between the interim and the final order in the *Kuvarega* case above:

> "The practice of seeking interim relief, which is exactly the same as substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a prima facie case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return date." (At p193 A-C)

However, where an urgent matter appears to have merit and the order can be rectified, that should done so as to do justice between the parties. Indeed as Chatikobo J himself observed despite his displeasure with the above procedural irregularity, that ultimately his dismissal of the matter that was before him was not because of the anomalies he had detected but more importantly because the matter lacked merit. Indeed there is no rule which forbids a judge in chambers, where a case truly merits, from having changes effected to a faulty provisional order. Understandably such action should be limited to meritorious instances because it is indeed ordinarily the requirement that a provisional order should truly be provisional when sought and not final.

In the case before me, Mr *O Mawadze* for the applicant indicated that para 2 of the interim order could be struck off altogether such that the application proceeds with only paragraph 1 as the interim relief sought particularly since the first respondent was opposed to an application for amendment. The interim relief does indeed contain not just the disputed overlay but also para 1 upon which it can stand should this matter is found to have merit. As such, para 2 of the interim relief which is the same as the final relief, is accordingly struck off without substitution.

The second point raised *in limine* by Mr *E Samkange* is that the certificate of urgency by the legal practitioner is not valid because in terms of 244 of the High Court Rules, 1971 he or she ought to objectively assess the urgency of the matter. The objection to the certificate attached is that the legal practitioner appears to have merely copied and pasted information that is in the founding affidavit. This is said be indicative of failure to apply his mind to the nature of the application before him.

Mr *Mawadze* argued in response to the objection that there is no hard and fast rule as to how the reasons should be crafted since what matters is whether or not they reveal urgency. Rule 244 which deals with urgent applications reads as follows:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of sub rule (2) of rule 242 to the effect that the matter is urgent, giving

> reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
>
> Provided that before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent."

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. Inevitably there will of necessity be some fundamental factual overlap between what is stated in the certificate of urgency by the legal practitioner, and what is averred in the founding affidavit by the applicant. After all they are drinking from the same fountain. That however does not mean that a practitioner is there to merely repeat what has been said. 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 other words, he distils the factual within the context of the legal to communicate the exigencies of urgency. Being that as it may, I do not think that a matter can be dismissed simply because there are close similarities in the wording between what has been captured as the core of the urgency by the practitioner and what the applicant himself or herself has said. Ultimately, the true test is whether the facts as stated, make out a case of urgency that justifies hearing the matter on that basis. My reading of the certificate of urgency and the application was that indeed a case had been made out. Accordingly, this point *in limine* is equally dismissed and I proceed to deal with the merits of the matter below.

The merits of the matter

The operative part of the consent paper dealing with the matrimonial home reads in clause 4 as follows:

> "4 The Plaintiff and defendant's matrimonial immovable property known as number 16 Lower Hampden Place, Stand Number 903, Marlborough Township, Harare registered in the Defendant's name under Deed of Transfer Number 0088972/2000:
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> 4.1 Shall be sold at an agreed price of US $150 000.00 and shared equally between the parties after paying costs for Capital Gains tax to Zimbabwe Revenue Authority and costs of Rates Clearance Certificate to City of Harare and;

4.2 Either party can buy 50% of the other within a period of one year of the granting of this order.

4.3 In the event that purchaser is found **immediately after the granting of this order,** the house shall be sold and the proceeds sold equally. (My emphasis)

4.4 If there is no purchaser, either party can buy the other out within a period of one (1) year for the same value from the granting of this order.

4.5 If the house is not sold immediately after the granting of this order to a third party , the house shall be auctioned after one (1) year from the date of this order to the highest bidder"

The central issue is what interpretation is to be placed on the use of the word "immediately" as captured in clause 4.3 of the consent paper. It would appear much ultimately depends on the circumstances of each case. In *R* v *Sikumbuzo* 1967 (4) SA 602 (RA) Beadle CJ said the word means "within a reasonable time in the circumstances of each case". A reasonable time is generally accorded to doing something "immediately" as opposed to requiring instantaneous action. Even in historical context, case law suggests strongly that the meaning given to the word has generally been contextual rather than pedantic.

In ***Words and Phrases Legally Defined*** [1] the following case extracts indicate a fact and contextual based interpretation of the word 'immediately':

> " The great question is, whether the condition in this contract, that the goods shall be taken from the vessel immediately she was ready to discharge, has been satisfied or not……The first point is what is the effect of the words 'immediately' here? Under ordinary circumstances when a man is called upon to do an act, and no time is specified, he is allowed a reasonable time for doing it; what is reasonable may depend on all the circumstances of the particular case. But here the word used being 'immediately', it implies that there is a more stringent requisition than what is ordinarily implied in the word 'reasonable'. Still, it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible". In *Alexiadi* v *Robinson* (1861)2 F & F 679 per Cockburn CJ a pp.683, 684."

Yet another example:

> "It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression within a reasonable time, and imply prompt, vigorous action without delay" *R* v *Berkshire* (1878) 4 Q.B.D 469 per Cockburn CJ., at p471"

Mr *J Samkange* who argued on the merits sought to apply a more doctrinaire meaning to the word highlighting that 3 to 7 days would be no more than was envisaged in its usage. Having represented the respondent in the divorce proceedings and crafted the consent paper with the input of Mr *Mawadze* for the applicant, he argued that there had been buyers in the

[1] John B. Saunders (ed) ***Words and Phrases Legally Defined*** Volume 3 I-N (London: Butterworths, 1969)

wings at the time the consent paper was crafted. But the reality is that I am now confined to interpreting the word as embodied in the document in light of the circumstances that have developed since its signing. Needless to state, the facts of this matter are a salutary reminder to practitioners to avoid vagueness in the drafting of consent papers - after all they are paid to solve rather than create their client's problems.

The property is being sold within a specific current economic environment- largely stagnant in nature where quick sales are certainly not the order of the day. Few people are currently able to come up front with the considerably high deposit that is required even if they get a loan. A five month period in the current circumstances for getting a buyer cannot in my view, given the sluggish reality of house sales in circumstances, be said to be indicative of failure to effect a sale 'immediately'. This is more so where the applicant seems to have put in motion following the divorce the active quest for a purchaser.

Nonetheless it equally important to balance this against the first respondent's position that he has in fact applied for a mortgage bond. His averments need to be fully contextualised. When he was advised of the existence of the purchaser on the 30th of March and again reminded on the 7th of April imploring him to sign the documents, his response on the 14th of April was to the estate agent whom he advised that the property was no longer for sale and that he was buying out his ex-wife. No proof was attached to this effect.

When this urgent application was brought on the 27th of April he made the same averments but again attached no proof that he had actually applied for a mortgage bond. It was in this light that I asked the first respondent, through his counsel who was Mr *ER Samkange* on that day, to obtain the proof of his application from CABS to allow me to make an informed decision. The applicant's counsel consented to the postponement of the matter to the following day albeit rightly pointing out that this was information that the first respondent should have provided without the need for prompting. Given that a purchaser has been found, and that a 'bird in hand is worth two in the bush', I emphasised that the information sought should address when the application was made and how long it is likely to take before a decision made by CABS on the mortgage issue. The matter was accordingly postponed to the 28th, of April for the obtainment of this information.

At the hearing on the 28th the letter was reported to have been done by CABS in Chinhoyi but had yet to be sent electronically due to challenges with power cuts. On the morning of the 29th the letter was placed before me.

It is dated Tuesday 28th April and reads as follows:

"To whom it may concern

We write to conform that Edgar Tafadzwa Kambarami I.D Number **63-273381 N47 holds a transactional account 1004474687** with CABS and has applied for a mortgage loan facility which is currently under consideration. For further information pertaining to this matter do not hesitate to contact the undersigned."

It is signed by one Daniel Gunhi the Area Manager for Chinhoyi. Respondent currently works in Chinhoyi. The information provided is unfortunately pedestrian in nature and does not really take the matter much further. More importantly it only placed before me not as a result of respondents own efforts to prove that he had applied for a mortgage bond. Instead he had to be requested to provide such proof. The information is decidedly non-committal. Indeed Mr *J Samkange* in arguing the merits and speaking to the loan application, stated that it was in fact the bank in Chinhoyi, through its manager, who in discussion with the respondent, indicated the possibility of him applying for a bond because his business account is with the bank. Thus whereas the applicant has clearly been taking measures to bring finality to property distribution following divorce, it would appear that the first respondent has not done anything without prompting. Even the letter proving his application has had to be coaxed from CABS on his behalf.

In the circumstances of the letter being essentially factual and non-committal, and there being no indications whatsoever as to whether or not he is likely to get the mortgage bond, I see no harm or prejudice that will be suffered by the first respondent, from withdrawing his letter to the estate agent as per the provisional order. I say this for the stronger reason that the property can truly be described as being no longer be for sale once a mortgage is approved and granted. It cannot be described as not being for sale simply on the strength of an application whose positive outcome or otherwise cannot be determined at this point.

Should indeed the mortgage be processed and approved by the time of the hearing of the final order and concrete proof is produced, that is indeed the point in time when it can be said that the property is no longer for sale.

Accordingly the provisional order is granted with costs on the following terms.

Pending the return date, it is hereby ordered that:-

1. Respondent be and is hereby directed to retract in writing to the purchaser and or the concerned Estate Agent, his communication dated the 14th of April 2015 which communication stated that the immovable property namely stand number 16 Lower Hampden Place, Stand Number 903, Marlborough , Harare is no longer on sale.

Manase & Manase, applicants legal practitioners
*Venturas and Samkange,*1st respondent's legal practitioners