CONDURAGO INVESTMENTS (PRIVATE)LIMITED
T/A MBADA DIAMONDS
versus
MUTUAL FINANCE (PRIVATE)LIMITED

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 7 May 2015 and 22 July 2015

Urgent Chamber Application

A Marara, for the applicant
Ms *NP Timba*, for the 1st respondent

BHUNU J: This is an urgent chamber application in which the Applicant seeks a provisional order staying execution against its property under warrant of execution granted by the magistrates' Court on 20 February 2015 under case number MC 32839/14. The warrant of execution is in the sum of US$178 348-88.

The first respondent being the judgment creditor has taken issue with the propriety of the application before me and a host of other points *in limine.*

I propose to dispose of this matter before delving into the other remaining issues.

The applicant's application is backed up by a certificate of urgency signed by *Fanuel Francis Nyamayaro*, a registered Legal Practitioner practising under the style of Nyamayaro and Bakasa Legal Practitioners. The certificate of urgency is dated 30 April 2015 whereas the applicant's founding affidavit is dated 4 May 2015. Thus the certificate of urgency predates the applicant's founding affidavit by 4 days when it is supposed to be based on the founding affidavit. What this means is that Mr *Nyamayaro* prepared and executed his certificate of urgency 4 days before the applicant had made and commissioned its founding affidavit.

This then makes nonsense of Mr *Nyamayaro*'s certification that he had read the applicant's founding affidavit on 30 April 2015 when that Founding affidavit was not in existence at the material time because it was only commissioned on 4 May 2015.

In the case of *Morgen Tsvangirai* v *Chair Person of the Electoral Commission* EC6/13

I was confronted with the same factual situation where the certificate of urgency was prepared 3 days before the founding affidavit had been commissioned. In that case I had this to say:

> "To make matters worse the applicant has filed case number EC 27/13 without a valid certificate of urgency as is required by law. A perusal of the documents shows that Mr. Batasara issued the certificate of urgency on 5 August 2013 three days before the applicant had deposed to his founding affidavit on 8 August 2013. Mr Batasara's assertion that he had read and understood the applicant's affidavit on 5 August 2013 is therefore false in fact and misleading. He could not possibly have read and understood the applicant's founding affidavit on the 5th of August when it was not in existence. Thus the applicant filed the application with a fake certificate of urgency. With respect, a fake and to that extent irregular certificate of urgency cannot establish urgency."

Rule 244 of the High Court Rules 1971 provides the requirement for a certificate of urgency as follows:

> "**244. Urgent applications**
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> Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (*b*) of subrule (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."

It is self-evident that a certificate of urgency is an indispensable component of a valid urgent chamber application which Gowora JA described as, *"the sine qua non for the placement of an urgent chamber application before a judge."*[1] Having said that the learned Judge of Appeal went on to quote the remarks of Gillespie J *in General Transport &Engineering (Pvt) Ltd & Ors* v *Zimbank Corp (Pvt) Ltd*1998 (2) ZLR 301where the learned judge had no kind words for legal practitioners who issue certificates of urgency as a matter of routine without first applying their minds. He characterised that kind of conduct as an abuse of the law and remarked in the process that;

> "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. More over 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 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 his certificate of urgency."

In this case the certifying lawyer's culpability is worse than that of the above lawyer in that he certified the application as urgent on the basis of a non-existent founding affidavit. In other

words he certified the matter as urgent without any idea as to the factual basis of the urgency.

In the ordinary run of things court cases must be heard strictly on a first come first served basis. It is only in exceptional circumstances that a party should be allowed to jump the queue depending on the exigencies and merits of each case the onus of which is on the applicant to establish.

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 and Another* 1998 (1) ZLR 188.

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 r244 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. This prompted Gowora JA in the case of *Oliver Mandishona Chidawu* (*supra*) to remark at page 6 that;

> "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. 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."

As we have already seen in this case a vital essential element for a valid certificate of urgency is missing in that the certificate of urgency was prepared without recourse to a valid founding affidavit as it predated the affidavit. That being the case, the certifying lawyer could not have properly applied his mind to the facts arising from a non-existent founding affidavit.

For that reason alone I come to the conclusion that the urgent chamber application is fatally defective for want of an essential element of such an application. The urgent chamber application is therefore unsustainable.

It is accordingly ordered that, the application be and is hereby dismissed with costs.

Mutamangira and Associates, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners