IATRIC INVESTMENT (PRIVATE) LIMITED
versus
MIRATE INVESTMENT (PRIVATE) LIMITED
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 13 July & 20 July 2016

**Urgent Chamber Application**

*S Hashiti* with Mr *Hwacha &* Mr *Sithole,* for applicant,
*A Moyo* with *S Behebhe & T Kativhu,* for respondent

TSANGA J: This is a judgment in an urgent application following the hearing of the parties orally on 13 July. The background to this judgment needs to be captured. The applicant, *Iatric Investment* filed an urgent chamber application on 28 June seeking stay of execution arising from a default judgment in case no. HC 11860 in which it had been sued for arrear rentals amounting to $ 197 476.30 and for eviction. The default judgment arose from a failure to plead, resulting in applicant being effectively barred. The urgent application was placed before me on 29 June since applicant had failed to persuade respondent to stop the execution. The applicant at the time had also filed an application for rescission of the default judgment whose hearing is pending as case no. HC 6570/16.

Hot on the heels of the urgent application, the respondent immediately filed a detailed notice of opposition to it. What this meant was that I was in fact able to assess urgency against the backdrop of both sets of papers. Additionally, the respondents filed heads of argument on the matter. Having read both sets of papers, I concluded that the matter was not urgent and that factually the urgency was entirely self-created. I was propelled to this swift decision against the background of the following condensed facts as gleaned from the papers that were before me.

The applicant runs a hospital called Dandaro in Borrowdale suburb, on premises let to it by the defendant, *Mirate Investments*. The applicant had a five year lease agreement with the latter which it entered into sometime in 2010. Rent had not been paid from April 2014 to date. The respondent had written to the applicant on 5 November 2015 to rectify the breach. Rather than "building bridges at its time of crisis" it appeared that the applicant had figuratively speaking, "chosen to build dams". Instead of paying rent, it had written on 24 November 2015 to the respondent to say certain of its previous directors (i.e. *Iatric's* then directors) had acquired an interest in *Mirate* and had done so at a time when these directors knew applicant held an offer to purchase the same shares. The applicant's point was that they had refused to exercise the right of first refusal at the time well knowing that they had their own interests in the respondent company through another entity *Baines Ave Clinic* where they were also directors. The applicant pointed out that it had been deprived of a business opportunity to purchase the property, and to safeguard its interests in the business at *Dandaro*. As such, applicant's response in November 2015 indicated that it was refusing to pay the rent in question and demanded restoration of the shares bought by these directors back to defendant so that it could exercise its right to purchase. This argument had been rejected by the respondent. Having failed to secure payment of the arrear rentals summons were issued by the respondent in December 2015 seeking cancellation of the lease agreement, an order of ejectment from *Dandaro Private Hospital* and payment of the sum of $ 197 476.30. On 3 March 2016 the applicant had written to the respondent to say that it intended to apply for joinder. On March 4 2016 the respondent had issued a notice to plead.

As regards the actual reason for the default judgement applicant's explanation as averred to by its then legal practitioner, was that the secretary had misfiled the notice to plead. The applicant's counsel averred that the receptionist having been off that day, the notice had been the received by a messenger who had left it on the desk for the receptionist. The misfiling by the receptionist when she returned to work was said to owe to her relative inexperience and newness on the job. Reference was made to the application for rescission, and in particular to sworn affidavit by the both the messenger and secretary detailing the occurrence of the error. Whilst an explanation was indeed rendered it was my view that it was unlikely to succeed. Firstly no detail was averred as to the extent of the secretary's newness on the job to give a full picture of the likelihood of her lack of experience. Secondly, and more significantly, respondent pointed out in its notice of opposition to this urgent

application, that even if the applicant had been oblivious of the notice to plead and to being barred, it had pointed out to applicant that it was barred from pleading in case HC 11860/15 on May 6 when respondent filed its opposing affidavit to the application for joinder. In fact at the time that the application for joinder was filed the applicant was already barred. The fact that the misfiled notice to plead was only located by applicant's lawyers on 21 June 2016 is neither here nor there given that applicant's lawyer did absolutely nothing to apply for the upliftment of the bar on being advised on 6 May that it was barred. A default judgement had been obtained on the 12 of May 2016. If applicant's counsel truly had not seen the notice to plead, surely they would have gone into full action mode to fully understand the reasons for the bar and to urgently place an application for upliftment.

I also saw little prospect of success on rescission given the reasons for non-payment of rent. The reason for failure to pay rent has no link with the basic obligation of a lessor which entitle a lessor to rent and which are well known. These include the obligation to deliver premises to the lessee, to maintain the premises and to ensure that a lessee has undisturbed use and enjoyment of the leased premises. Having been advised that the matter was not urgent, applicant's counsel *Gonese and Lunga* at the time wrote on 4 July that they were of the considered view that if given an opportunity for oral submissions, they might yet be able to convince me on the issue of urgency. It was against this overall backdrop that it was communicated more fully to the applicant's counsel, that the urgency was self-created and that the dispute regarding the thwarted share purchases was a different matter altogether.

Having been advised of the reasons for lack of urgency, applicant changed lawyers and adopted a strategy firmly rooted in persistence, being that if you 'knock long and loud enough the door will finally be opened." The new lawyers took the stand that the urgent application was still pending given that the endorsement on non-urgency had been on papers made without hearing oral arguments. They also indicated that they had engaged counsel who would file papers on urgency. As regards the pending nature of a case where " not urgent" has been endorsed, they relied on the case of the *Church of the Province of Central Africa* v *Diocesan Trustees for the Diocese of Harare*[1] in which Mavangira J as she then was opined as follows on the declaration of non-urgency without oral arguments having been heard:

> "The endorsement that the matter is not urgent was made on a consideration of the papers without hearing any oral arguments by the parties. It was the court's *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the

[1] 2010 (1) ZLR 346 (H)

> merits of the issue of urgency. It is my considered view that this court cannot be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by the parties on the pertinent issue. In my view the court would then become *functus officio.*"[2]

Indeed parties have a right to be heard and will be granted that opportunity in urgent applications where they so request in a matter where the judge has communicated the view that the matter is not urgent. However, the right to be heard and the fact that the judge is not *functus officio* should not make light of the role of affidavits in application proceedings, including urgent applications. It is essentially therein that a party is expected to go all out in stating their case. Oral submissions provide a party with a chance to clarify issues that are already in their papers and to answer any questions that the judge may have regarding reaching a decision. Very rarely will oral submissions be the basis for clothing an application with the urgency that a party has not revealed in their papers. There are many applications that are filed as urgent applications that clearly show no urgency in substance and that all too frequently reveal self-inflicted urgency. It is therefore within the realm of a judge to control proceedings and prevent abuse of court process by sifting the wheat from chaff in the initial instance whilst remaining alive to the exercise by party of the right to be heard at the instance of a party.

I acceded to the request to allow for the exercise of the right and to hear both parties on urgency. The applicant's enlisted advocate was indeed present, with two lawyers in tow. However, no further documents were filed on behalf of by applicant despite the knowledge that the respondent had availed its full set of papers and in spite of promises to do so.

In his oral submissions, heavy reliance was placed by Mr *Hashiti*, who now appeared for applicant, on the case of *Zimbabwe Banking Corp* v *Masendeke.*[3] This was for the argument that the lawyer should have at least suspected when no notice to plead was entered that something had gone wrong. It was somewhat with glee that he hinted that before me was the very same Mr *Moyo* whom the court had had occasion to figuratively slap on the wrist for attempting to snatch at a judgment in the above mentioned case, who was by implication still unrepentantly at it again. Mr *Hashiti* further zeroed in on the fact that the application for joinder was still a pending matter and that as such default judgement should never have been granted as the application for joinder acted as a bar to proceedings. Mr *Moyo* who appeared

[2] 2010 (1) ZLR 346 at p347 H & 348A-B
[3] 1995 ( 2) ZLR 400 ( S )

for the respondent pointed out that at the time that application for joinder was made by applicant in April 2016, they were already barred and could not have applied for joinder. Furthermore, he reiterated that in responding to the application for joinder it had clearly been brought to their then lawyer's attention on 6 May that the applicant was barred.

Mr *Hashiti* also argued that the need to act arose when the default judgment was granted and that they immediately filed an application for rescission upon awareness. This makes little sense under the full circumstances of the case. Indeed it would appear that some parties, through their practitioners, have formed the view that urgency in the legal sense is confined to acting in response to the catastrophic event such as knowledge of the writ of execution for default judgement in this case. But as respondent's lawyer rightly pointed out both in its papers and at the hearing, the attachment of property does not itself create urgency. The facts, and the totality of the circumstances often speak for themselves as regards urgency (See *Independent Financial Services Pvt Limited* v *Colshot Investments Pvt Ltd & Anor;*[4] *Ishmael Phiri* v *FBC Ltd & Anor*[5]) Relying on the case of *Mudzvova and Anor*[6], Mr *Hashiti* also argued that the court should lean towards having the case heard on merits as the applicant would be prejudiced in its pending claims if this court decides otherwise.

On respondent's part, Mr *Moyo* revealed that the writ has already been effected and that the applicants have been given up to the end of July to attend to the relocation of patients. He re-emphasised what is already common cause which is that the applicants have not paid rent. Whilst a sum of $10 000.00 was paid sometime in February 2016, he said the applicants had asked for it back on the basis that it had been paid in error. It was his position that what applicant as tenant was asking this court to do was to help it to stay for free when there is no dispute as regards the rentals that they owe. He further emphasised that the applicants was aware of the transaction involving shares as way back as January 2013 and that it was only in 2014 that they decided to stop paying rent.

I have exercised my mind on the issue of who would be more prejudiced between the applicant and the respondent in this instance. My conclusion remains the same that it is the respondent who would be prejudiced because this is not a case where a party is simply clinging tenaciously at all costs to a default judgement. The facts need to be looked at holistically instead of just zeroing in on the fact of the applicant's explanation that it did not

[4] 2002 (2) ZLR 494 (H);
[5] HC 138-10
[6] HH 228/15

see the notice to plead. At the end of the day the case is about failure to pay rentals, which rentals are not disputed and which rentals applicant has in reality up to date manifested no intention of paying. The sum owing for rentals, based on monthly rentals of $15 000.00 is said by respondent to now stand at $332 414.80. The reason why the rentals have not been paid has nothing to do with the lease that applicant had with the respondent. It would be highly prejudicial in my view to grant the provisional order prayed for which is to stay the writ of execution in case No. HC 11860/15.

I remain in agreement with the respondents that there is no co relation between the actions of its own directors which applicant was aware of in 2013 and its decision not to pay rent. If indeed it holds a grievance at its former directors, this has nothing to do with rentals and the agreement of lease it had entered into with the respondent. The respondent is correct that the applicant cannot shield itself with a counter claim that has nothing to do with rentals. It is for these reasons that I saw and still see no prospects of success on rescission. The applicant can still pursue a separate case against its former directors which has nothing to do with rentals.

The respondent has argued for costs on a higher scale for applicant's conduct. I agree that the urgent application has not been brought in good faith under the full circumstances of the case.

Accordingly I find as follows:

1. The matter is struck off the urgent roll.
2. The applicant to pay costs of suit for the urgent application on a legal practitioner and client scale.

*Dube Manikai & Hwacha*, applicant's legal practitioners
*Kantor & Immerman*, respondent's legal practitioners