ELLIOT RODGERS
versus
PUWAYI CHIUTSI
and
TENDAI MASHAMAHANDA
and
REGISTRAR OF DEEDS
and
SHERIFF OF ZIMBABWE
and
BARIADE INVESTMENTS PVT LIMITED
and
THE LAW SOCIETY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27, 29 February 2019, 1 & 14 March 2019

Urgent chamber application

T. Biti, for the applicant
S.M. Hashiti, for the 2nd respondent
A. Sadomba, for the 5th respondent
C.Z. Chikara, for the 6th respondent

MANZUNZU J: This is an urgent application in which the applicant sought a provisional order in the following terms

> "Terms of final order sought
> It is ordered that;
> 4.1 That Puwayi Chiutsi be and is hereby is struck off from the roll of legal practitioners.
> 4.2. That Puwayi Chiutsi, and the Sheriff of Zimbabwe each paying the other, the other to be absolved pays costs of suit on a scale as between attorney and client.
> 4.3. The applicant's legal practitioners be and is hereby given leave to serve the copy of this order to the Registrar of Deeds.
>
> Terms of Interim Order Sought
> Pending the final determination of this matter, at the return date, the applicant is granted the following relief;
> (i) That Deed of Transfer No. 708/19, issued in the name of Tendai Mashamhanda in respect of a piece of land in the district of Salisbury called the remainder of Subdivision C of Lot 6 of Lot 190,191, 192, 193, 194 and 195 Highlands Estate of Welmoed measuring 4,377 square metres be and is hereby cancelled.
> (ii) That forthwith the Law Society of Zimbabwe, must place the law firm of Puwayi Chiutsi under curatorship in terms of the Legal Practitioner's Act.

(iii) Puwayi Chiutsi be and is hereby suspended from the practise of the legal profession."

On 28 February 2018 I heard submissions on the issue of urgency. The first respondent argued that the matter was not urgent. In an *ex-tempore* ruling, I ruled that the matter was not urgent in so far as it relates to the relief sought to compel the Law Society to place the law firm of Puwayi Chiutsi under curatorship and in respect to the suspension of Puwayi Chiutsi from practise as a legal practitioner. This was in my view, a cause which can be pursued in an ordinary application since no irreparable harm was shown to be suffered by the applicant if the matter was not treated as urgent. Furthermore, that second part of the relief sought could by no means meet the requirements of urgency as set out in case law; See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188.

I proceeded to hear the merits of the application on 1 March 2019. The first respondent was in default. Before commencement of submissions I drew Mr *Biti*'s attention to the fact that the interim relief sought was in fact a final order i.e. the prayer for cancellation of Deed of Transfer No. 708/19 issued in the name of the second respondent. Mr *Biti* said he was aware of that and was going to seek the order in that form. He applied for the amendment of the Provisional Order by removal of that part of the prayer for which the court had ruled could not proceed on urgency. He also sought the removal of all such similar relief from the final order sought and that the final order sought should only contain the issue of costs. This was so, I believe, because the interim relief sought a final order.

The background to this matter is an ugly one. The applicant has put a very detailed narration of the background to this matter in the founding affidavit. I will state hereunder a brief summary:

It's a simple matter which should not have protracted to this end had it not been for the unruly behaviour by the first respondent. The first respondent is a legal practitioner practising under the style Puwayi Chiutsi Legal Practitioner law firm (Chiutsi). In 2012 applicant sold his property and instructed Chiutsi to do the conveyancing work. Chiutsi also received US$266 000 the purchase price in his Trust Account as always is the norm before transfer. Transfer was concluded a year later on 10 September 2013. By then Chiutsi had transferred US$150000 to the applicant leaving a balance of US$116 000 which he ought to have accounted upon transfer. Chiutsi raised some invoices in an effort to account for the retention of the balance as he offered to pay applicant the balance of $70 000. The applicant sued Chiutsi for the recovery of his money which action resulted in two judgments against Chiutsi for the amounts of $70 000 and

$45 000 respectively. The enforcement of the two judgments lead to the attachment of Chiutsi's immovable property. Chiutsi went berserk with litigation appealing against every decision of this court and challenging the sale in execution of his property. For every move he took, he lost with judgments describing his conduct as deplorable, unethical and unprofessional.

Despite the judicial attachment of Chiutsi's immovable property and in fact with a sale having been confirmed by the Sheriff, against all odds, Chiutsi sold the property and transferred ownership to the second respondent.

The applicant's interest in this application is for him to get his money from Chiutsi. The sale of Chiutsi's immovable property to the fifth respondent by the Sheriff had at least guaranteed him of his money. He fears the second respondent may pass title to a third party complicating his chances of recovering his money.

Chiutsi said he has now paid $115 000 to the applicant through his lawyers' trust account. The payment has been acknowledged though there is a dispute as to whether or not such payment is considered as payment towards the judgment debt because, as Mr *Biti* argued, it goes towards costs. As I have already pointed out, the applicant's interest is to get his money, otherwise he cannot be seen fighting a case for the fifth respondent as to whether the sale between fifth respondent and Sheriff should proceed. He has no mandate to do so.

The question which the court must resolve is whether or not it is appropriate for the applicant to obtain a final order under the circumstances. Mr *Biti* said it was appropriate and Advocate *Hashiti* said it was not. It was submitted on behalf of the second respondent that the second respondent was ready to accept an interim interdict to stop any transfer of the property pending a determination on the return day for confirmation or otherwise of the cancellation of the title deed. This was a suggestion by the second respondent as a way to secure the interests of the applicant. However, applicant did not move for any remedy in the alternative. He opted to stand or fall on the final relief being sought.

The applicant in his papers seeks a provisional order with an interim order which is in fact a final order. Urgent applications are brought to seek provisional orders as a measure to secure someone's interests pending a return day for confirmation or discharge. The draft order by the applicant under the interim order sought says "pending the final determination of this matter, <u>at the return date,</u> the applicant is granted the following relief." (my underlining). It is then a self-defeating argument to say one should get a final order at this stage. What should then happen on the return day. In fact, the return day will no longer be necessary for the applicant. I disagree with Mr *Biti* for the argument he advanced to secure a final order. He relied on the inherent

jurisdiction of this Court, that the High Court Act does not prohibit such order being granted and also referred to some case law which I did not find helpful to resolve this issue. There are a number of issues which ought to be fully argued on the return day, e.g. the effect of the payment by Chiutsi, whether applicant has the *locus standi* to bring this application, issues of an innocent purchaser, existence of caveat or otherwise etc.

This matter is an urgent application. If granted, it must have a return day, giving an opportunity to all parties to present their side of story not in an urgent atmosphere. While it is accepted that there are instances where the court may grant a final order in an urgent application. However that depends with the uniqueness of the nature of relief sought. In *casu*, it is not desirable because the applicant's interests can be secured with a temporary interdict prohibiting any transfer of property by the second respondent. The interim interdict has not been pushed for by the applicant as an alternative. The court can therefore not grant that which has not been asked for. The omnibus approach advocated by Mr *Biti* in his submission is undesirable, one cannot obtain a final order in these circumstances. For these reasons this application is bound to fail.

Accordingly:

IT IS ORDERED THAT:

1. The application be and is hereby dismissed with costs.

Tendai Biti Law, plaintiff's legal practitioners
Puwayi Chiutsi Legal Practitioners, 1st respondent's legal practitioners
Mataka Legal Practice, 2nd respondent's legal practitioners
Gill Godlton & Gerrans Legal Practitioners, 5th respondent's legal practitioners
Law Society of Zimbabwe, 6th respondent's legal practitioners