LEGACY HOSPITALITY MANAGEMENT SERVICES LIMITED
versus
AFRICAN SUN LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 13 May 2019 & 16 May 2019

Urgent Chamber Application

Advocate T Zhuwarara, for the applicant
Advocate E Matinenga, for the respondent

MATANDA-MOYO J: Applicant approached this court by way of urgent application for the following relief:

"TERMS OF THE INTERIM RELIEF GRANTED

1. The handover of control and management of respondent's 5 hotels and lodges in Zimbabwe namely: the Elephant Hills and Conference Centre, the Monomotapa Hotel, the Trout Beck, Hwange Safari Lodge and Kingdom Hotel at Victoria Falls, from the applicant to the respondent is temporarily suspended pending the determination of HC 3823/19.
2. The respondent is temporarily barred from insisting on, or publicizing, the handover of the management of the hotels and resorts; being Elephant Hills and Conference Centre, the Monomotapa Hotel, the Trout Beck , Hwange Safari Lodge and the Kingdom Hotel at Victoria Falls, pending the determination of HC 3823/19

TERMS OF FINAL DRAFT

IT IS HEREBY CONFIRMED ON THE RETURN DATE THAT:

1. The handover of control and management of respondent's 5 hotels and lodges in Zimbabwe namely, Elephant Hills and Conference Centre, the Monomotapa Hotel, the Trout Beck , Hwange Safari Lodge and the Kingdom Hotel at Victoria

Falls, from the applicant to the respondent is permanently stayed pending the determination of HC 3823/19 ."

The brief facts are that sometime in September 2015 applicant and respondent entered into agreements whereby the applicant was given management of the above hotels and lodges. Ever since then the applicant has been managing and controlling respondent's 5 above listed hotels and lodges. Around September 2018 the respondent terminated the management agreements on the basis of supervening impossibility. The Reserve Bank had declined to authorise payment of the management fees due to applicant.

Applicant challenged the termination and referred the dispute for arbitration. Applicant was of the view that the termination of the management agreements was unlawful and that the termination was not done in terms of the agreed terms between the parties. The parties expressly agreed that the applicant would remain in effective control and management of the hotels and lodges during the arbitration process.

The arbitrator handed down his ruling on the dispute on 16 April 2019. He dismissed the applicant's case. On 30 April 2019 the respondent wrote to applicant advising applicant of respondent's intention of resuming control of its hotels and lodges by the 30th of June 2019. On 2 May 2019 respondent again wrote to applicant demanding that the process of handover of the management of the hotels and lodges be started by the next day. Applicant responded by advising respondent that it disagreed with the Arbitrator's award. On 8 May 2019 applicant filed an application before this court for the setting aside of the arbitral award – HC 3823/19 refers. On 10 May 2019 applicant filed the present urgent application.

The respondent raised a point *in limine* that the matter is not urgent. The respondent submitted that the applicant failed to act timeously and should not be allowed to be heard on an urgent basis. Respondent submitted that the parties had agreed to maintain the status *quo* up until the date of the award. Once the award was handed down applicant had no valid reason to continue providing management services at respondent's hotels and lodges. The effect of the award was for applicant to hand over management of the hotels and lodges to the respondent. By filing the urgent application on 10 May 2019, the applicant failed to treat its own matter as urgent. The urgency becomes self-created. Respondents urged the court to refuse to hear the matter on an urgent basis.

The applicant on the other hand insisted that it acted timeously. Applicant submitted that the award was made available to the parties on the on 24 April 2019. Applicant averred that the matter should be heard urgently so as to protect the efficacy of HC 3823/19, otherwise that determination would be rendered academic. Respondent believes that failure to hear the matter on an urgent basis would deny it of the right to recourse and protection of the law under HC 3823/19.

The applicant submitted that because the respondent had agreed to maintaining the *status quo* it had no fears that anything would change because of the arbitral award. Applicant insisted it acted swiftly and that the matter should be heard on an urgent basis. Applicant believed the trigger was the letter from the respondents of 30 April 2019.

For the courts to treat a matter as urgent, the applicant should have treated the matter with urgency. A party requesting their matter to be heard urgently must first pass the hurdle of persuading the court to leave all the other matters pending before it and attend to applicant's matter. Applicant must show that indeed its matter cannot wait and that applicant has no other remedy available. In terms of s 56 of the Constitution of Zimbabwe. "All persons are equal before the law and have the right to equal protection and benefit of the law." Matters before the court should be heard on the basis of first filed, first to be heard. An applicant in an urgent application should therefore show why his matter should jump the queue ahead of other matters pending before this court.

Let me decide whether applicant acted when the need to act arose. Let me divert a bit and look at the real cause of the dispute. The Reserve Bank of Zimbabwe to me is at the centre of these parties' dispute. The Reserve Bank of Zimbabwe refused to renew the agreement between the parties after 8 January 2017. The need to act to me arose then. The applicant was enjoined to take up measures to protect its interests by ensuing that it persuades the Reserve Bank to renew the agreement. Applicant has to date not taken any steps to safeguard its rights.

Instead applicant chose the arbitration route against the respondent. The parties agreed to maintain the *status quo* until the finalisation of the arbitration process. Such process was finalised on 16 April 2019. The parties however received the written award on 24 April 2019. From that day the applicant was aware that its continued control and management of respondent's properties ended with the arbitral award. However applicant sat back and did nothing. Applicant waited until

the respondent requested that the parties proceeded to do a handover. As was enunciated by CHATIKOBO J in *Kuvarega* v *Registrar-General and Another* 1998 (1) ZLR 188 H at p 193 F-G where he said;

> "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."

The trigger in this case was the determination of the arbitral case. The trigger was not the letters by the respondent. The need to act according to the parties agreement stemmed from the day applicant became aware of the arbitral award. From that day applicant knew it should commence handover proceedings. Applicant waited from the 16th. Even accepting the date of 24 April when applicant received the arbitral award, by reasonable standards, applicant failed to treat its matter as urgent. As MCNALLY JA stated in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (SC) at p 290;

> "vigilantibus non dormientibus jura subveniunt simply translated "the law helps the vigilant but not the sluggard." See also *Beitbrige Rural District Council* v *Russel Construction Co. (Pvt) Ltd* 1998 (2) ZLR 190 (SC)."

The explanation by the applicant that it assumed that respondent would not insist on taking over management, as had happened in the past lacks merit. Communication between the parties was clear that the *status quo* would be maintained until finalisation of the arbitration process. The applicant tried to stretch the meaning to include any challenges of the arbitral award. I do not read that into the agreement. The respondent was clear in that it would let applicant continue managing its hotels and lodges until the arbitrator determined the dispute.

I am satisfied that applicant failed to take action that was effective in protecting its rights Engaging the respondent once the arbitral award was out did not amount to acting timeously. In any case both the certificate of urgency and the founding affidavits fail to explain why timeous action was not taken. See *Main Road Motors* v *Commissioner-General, ZIMRA*, *Choniwa* v *Commissioner-General ZIMRA* HMA 17/17.

In the end I am not convinced applicant satisfied the test for its matter to be heard urgently. Besides applicant has alternative remedies including claim for damages against the respondent. Respondent is not a pauper and there is no suggestion that respondent may fail to pay any damages if ordered to do so.

Accordingly the matter is not urgent and is removed from the roll of urgent matters with costs.

Mawere Sibanda., applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners