Judgment No. HB 158/04
Case No. HC 1815/04

LAVAL INVESTMENTS (PVT) LTD

Versus

B A NCUBE HOLDINGS (PVT) LTD
T/a AIRPORT ROAD FILING STATION

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 SEPTEMBER & 16 DECEMBR 2004

J Tshuma for applicant
Adv. E T Matinega with R Nyathi for respondent

Ruling on point in *limine*

NDOU J: In this matter, *Adv. Matinenga*, for the respondent raised a point in *limine* on the absence of urgency. I propose to sketch a chronology of the facts to determine whether there is urgency in this matter. The applicant approached this court via an urgent chamber application. The application came under certificate of urgency and was issued on 19 May 2004. I directed that the respondent be served with the application and set the matter down for hearing on 24 May 2004. On that day the respondent made an application for postponement. Despite vigorous opposition the postponement was granted. The matter was postponed to 31 May 2004. On that day the applicant sought and obtained a postponement to 24 June 2004. On the latter date none of the parties appeared. There was no explanation given at the time for the non-appearance by both sides. The matter was, as a result thereof, removed from the roll. It must, however, be pointed out that the applicant's erstwhile legal practitioners had renounced agency on 18 June 2004. The applicant's current legal practitioners assumed agency on 22 June 2004. On 17 August 2004 the applicant's legal practitioners wrote to the Assistant Registrar seeking the resumption of the matter still on the basis of urgency. I directed that the matter be set down for 6

September 2004 with the respondents being informed of the set down date. On 6 September 2004 the respondent sought and obtained postponement to 17 September 2004 in order to secure the services of counsel from Harare.

On 17 September 2004 *Adv. Matinenga* for the respondent, raised a point in *limine*. The preliminary point is whether the matter is still urgent in light of its history sketched above. He submitted that after lapse of five(5) months the matter was no longer urgent. He rightly pointed out that it is up to legal practitioner who made a certificate of urgency, who entertains the belief of urgency to certify that the matter is urgent, but it is up to the Judge or court to endorse or reject the belief. The question of approaching the court via the route of urgent application has been dealt with by our courts several times. It is clear that this route is unnecessarily and wrongly used. The test for urgency was sent out by CHATIKOBO J in *Kuverega* v *Registrar-General & Anor* 1998(1) ZLR 188(H) at 193F-G as follows:-

> "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 dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there had been any delay."

Further in *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Eng Co (Pvt) Ltd* HH-116-98 GILLESPIE J stated:-

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hallow because of the delay in obtaining it"
> See also *General Transport & Engineering P/L & Ors* v *ZIMBANK Corp P/L* 1998(2) ZLR 301(H) and *Mshonga & Ors* v *Min of Local Government & Ors* HH-

129-04. And further, in *Gulmit Investments (Pvt) Ltd* v *Ranchville Enterprises (Pvt) Ltd & Ors* HH-94-04 at page 2 of the cyclostyled judgment MAKARAU J said-

> "This court has held that an application is urgent when if at the time the cause of action arises determination of the matter cannot wait … In such a case, the filing of an application with the court immediately the cause of action arises acts to underscore the urgency of the matter and the vigilance of the applicant. A delay may however occur between the cause of action arising and the filing of the application with the court. Where urgency of the matter is born out of that delay, then unless the delay is satisfactorily explained, the non-action on the part of the applicant until his or her legal position is altered by some other vigilant person cannot constitute urgency for the purposes of the rules of this court. Where however the delay in bringing the matter to court does not create the urgency nor further complicates the matter, in my view, this should not be held to detract from the urgency of the matter especially where the delay in approaching the court for relief is not inordinate."

In *casu*, there is no explanation for failing to prosecute the matter with diligence over a period of five months. In the circumstances, urgency can only be founded on the original certificate of urgency and the founding affidavit. The basis of approaching this court under certificate of urgency is as follows:

> "2.1 Having no legal or lawful basis to refuse to vacate the premises of the Maplanka family, being managed by applicant, a Maplanka family company, respondent is interfering with the business operations of applicant by refusing to allow applicant use of the Maplanka family premises.
> 2.2 Applicant's business operations are being severely compromised to a point where applicant, solely by virtue of respondent's defiance and intransigence, stands to lose out on a contract that applicant has recently entered into with Comoil, as applicant is literally on the verge of being in breach of its contractual obligation to Comoil which breach will not arise if respondent vacates the premises immediately.
> 2.3 Respondent's refusal to vacate, despite being so notified and not possessing a signed lease agreement is severely compromising applicant in that applicant is incurring on average loss of earnings of approximately $100 000 000 per day which sum given respondent's own admission, applicant might never be able to recover, against respondent."

Paragraphs 2.1 and 2.3 do not establish the type of urgency contemplated by the rules. All that can be discerned from these paragraphs is that money will be lost. The consequence of loss of money will easily be remedied by a claim for damages. In paragraph 2.2 the newly undertaken obligation to Comoil is entirely self-created by the applicant. It had no business committing the property that was not ready to use but the subject of a dispute – *Dilwim* case *supra*. The property has been in possession of the respondent since October 2001. Whether the lease was signed or not, the applicant, through his appointed estate agent, John Pocock & Company, was receiving rentals for the property. Applicant was aware that Comoil moved into the disputed premises at the behest of the respondent. Applicant was aware that the respondent required a 10 year lease to comply with its obligations to Comoil. With this knowledge the applicant went and negotiated with Comoil for a similar agreement and in respect of the disputed premises. This is a classical example of self created urgency. The applicant cannot benefit therefrom in order to jump the queue and benefit from deviation from the rules. By its conduct, the applicant did not display urgency. I agree with Mr *Tshuma*, for the applicant, that the delay of five months may, in certain circumstances, be explained. But in *casu*, save for the submissions by Mr *Tshuma* from the bar, the non-action has not been explained. There was no need to bring these proceedings as a matter of urgency. Although I appreciate that I have discretion whether to refer the matter to trial or dismiss it altogether, I choose the latter. Having initiated these proceedings by way of a flawed basis of urgency, and have been non-active for around five(5) months the applicants should have reasonably foreseen the problems raised in the point in *limine*.

The conclusion is that the application is refused with costs.

Webb, Low & Barry, applicant's legal practitioners
Marondedze, Nyathi, Majome & Partners, respondent's legal practitioners