Judgment No. HB 162/04
Case No. HC 3599/04

CITY INDUSTRIES (PVT) LTD

Versus

MIKE MUVAMBWI

And

DEPUTY SHERIFF, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 16 DECEMBER 2004

N Masuku for applicant
C Dube for respondent

Urgent Application

CHEDA J: This is an urgent application for eviction filed by applicant on 11 October 2004. On perusal of the application I ordered that it be served on the respondents as a cursory look of it did not strike me as urgent.

Applicant is a duly registered company in Zimbabwe and trades as Peter Car Sales. It is common cause that on 10 July 2004 applicant entered into a lease agreement (thereafter referred as the agreement) with one Mbonisi Gatsheni. The said lease agreement was to expire on 20 September 2004. In addition to the said agreement applicant then entered into a verbal agreement with 1st respondent wherein both were to hire the same premises up to 30 September 2004 being the time of expiry of the lease.

Applicant company on its own renewed its lease with Mbonisi Gatsheni and excluded 1st respondent. He now wants 1st respondent to vacate the said premises altogether. First respondent has resisted that move by applicant hence this application. Mr *C Dube* for 1st respondent raised a point *in limine* being that-

1. the matter was not urgent; and
2. applicant had adopted a wrong procedure when instituting these proceedings.

I propose to deal with these issues as follows:

Urgent

The basis for proceeding by an urgent chamber application is that the matter is urgent. Urgency as envisaged by the rules is that it is the type of urgency whose postponement will result in irreparable harm to the applicant. To avoid litigants flooding the courts with matters they perceive as urgent, it is a legal requirement that a practitioner issues a certificate of urgency. However, the said certificate though filed, a judge in chambers has to satisfy himself that the matter is indeed urgent. To so determine all the circumstances surrounding the matter have to be taken into account.

In *casu*, applicant sublet the premises to 1st respondent up to 30 September 2004. The agreement was a verbal one. It avers that it now wants to expand its business. Applicant and 1st respondent have been together for the past three months and it is clear that they have fallen out of favour, no convincing reasons have been given. That on its own can not make the matter urgent.

Urgent applications require that the judge or court should dispense with the ordinary rules of court which require notification to the other party. It is therefore necessary for the applicant to set out in its founding affidavit explicitly the circumstances on which it anchors its allegations of urgency and the reasons why it is of the view that it should be granted the interim relief sought without the other party being heard. Applicant has failed to show that the matter is indeed urgent. It is not

enough to show that it now wants to expand its business. No irreparable harm has been alleged to befall applicant in the event of it proceeding by ordinary application and above all there are other available remedies available to applicant. The matter is therefore not urgent.

Procedure

Mr *Dube* has also argued that applicant adopted the wrong procedure in bringing these proceedings to court in that it should have proceeded by action as opposed to motion. His contention is that the eviction proceedings should be by way of action. This principle is well known.

The question is whether or not applicant was correct in adopting this procedure. Applicant's application on its own raises two major problems *viz*:

1. the apparent dispute of facts; and
2. the similarity between the interim and final orders.

Applicant's lease agreement with respondent is verbal, that on its own raises an issue about *viva voce* evidence which cannot be resolved on papers. In fact it is one of the reasons why eviction proceedings should always be by way of action. It is clear that 1st respondent now denies the material facts of the verbal agreement.

It will therefore be unfair for 1st respondent to be deprived of his day in court on the mere say-so of applicant. Where there is a possibility that applicant may not have disclosed the whole truth it is only fair and just to have its averments tested by way of cross-examination in court.

Both orders are the same. The rationale of an interim order is to prevent the continuous harm already occurring or anticipated, at the same time giving another party a chance to respond. As such it must not be final, for if it is, then it finally

deprives the other party of its day in court and this is against the principles of natural justice.

Applicant's order brings the matters to finality without giving the other party an opportunity to be heard. This is not the proper procedure in applying for an interim relief. In *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188H at 193A-B, CHATIKOBO J stated-

> "The practice of seeking relief which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In fact, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where as here the applicant will have no interest in the outcome of the case on the return day."

I fully associate myself with the learned judge's remark.

In *casu*, once 1st respondent is out of the premises, applicant will have no zeal to pursue this application as 1st respondent will not be an inconvenience to it anyway.

The application is therefore dismissed with costs on the ordinary scale.

Ben Baron & Partners applicant's legal practitioners
Dube & Partners respondent's legal practitioners