Judgment No. HB 82/06
Case No. HC 1578/06
X-Ref HC 1541/06

ESTATE LATE GEORGE UTAUMIRE

And

SHYREEN GOREMUCHECHE

And

EPIPHANIA KADZUNGE

And

MORGAN KADZUNGE

And

TEL ONE

And

ZIMBABWE ELECTRICITY DISTRIBUTION COMPANY

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 AUGUST 2006

M Nzarayapenga with Ms D Vundla for the applicants
S Mazibisa with N Ncube for 1st and 2nd respondents

Urgent Chamber Application

NDOU J: Briefly, the 1st and 2nd respondents issued summons against 2nd applicant under cross-reference case number HC 1578/06. They seek therein the eviction of the 2nd applicant from Woza Woza Supermarket and Butchery, Emakhandeni, Bulawayo plus hold over damages. The summons were issued out on 12 July 2006. It is not clear whether the summons were served on 2nd applicant but three days later (i.e. on 15 July 2006) the applicants filed this application with this

court under a certificate of urgency. The applicants obtained an *ex parte* order in the following terms:

"Terms of the final order sought

1. That you should cause to this honourable court why a final order should not be made in the following terms:
   (i) That 1st and 2nd respondents be and are hereby interdicted from interfering with 1st applicant's peaceful occupation of the leased premises being stand 942 Emakhandeni, Bulawayo, including the instruction to 3rd, 4th and 5th respondents to terminate service to the said premises or bring or referring people to view the premises as potential tenants.
   (ii) 3rd, 4th and 5th respondents be and are hereby interdicted from terminating services, that is phone shop's four lines, electricity and water, to stand 942 Emakhandeni, Bulawayo provided that 1st applicant continue paying such services.
   (iii) 1st and 2nd respondents be and are hereby ordered to give six calendar months notice for 1st applicant to vacate from the leased premises.
   (iv) That 1st and 2nd respondents or any person(s) acting or purporting to be acting in their interest keep absolute peace towards 2nd applicant of any of its 1st applicant's employees particularly that they do not harass, threaten or use abusive language or conducting themselves in any manner that might cause fear in 2nd applicant and 1st applicant's employees.
   (v) That 1st and 2nd respondents pay costs jointly and severally the one paying the other to be absolved on an attorney-client scale.

2. Interim relief sought

Pending the finalization of this matter, applicants be and are hereby granted the following interim relief.
   (i) That 1st and 2nd respondents be and are hereby interdicted from interfering with 1st applicant's operations at Woza Woza Supermarket, Butchery and Phone Shop at stand 942 Emakhandeni, Bulawayo including the bringing in or referring any other people thereat.
   (ii) That 3rd , 4th and 5th respondents be and are hereby ordered to immediately upon service of this order reconnect phone shop telephone lines, electricity and water respectively, to stand 942 Emakhandeni, Bulawayo.
   (iii) That 1st ad 2nd respondent or any other person(s) acting on their interest keep absolute peace towards 2nd applicant or to any employee(s) of the 1st applicant at its business known as Woza Woza Supermarket situated at stand 942 Emakhandeni, Bulawayo, particularly that they do not harass, threaten or use

> abusive language or conduct themselves in any manner that might cause fear in her and 1st applicant's employees …"

The above order was granted on 16 July 2006. The 1st and 2nd respondents oppose the provisional order. They filed their opposing papers on 19 July 2006. Together with opposing papers, their legal practitioners of record addressed a letter to the Registrar of this court in the following terms:

> "On 16 July 2006 the Honourable Justice Cheda granted a provisional order in the matter. We have assumed agency for the 1st and 2nd respondents and filed opposing papers.
>
> May you please place the file before his Lordship to call the parties in chambers for a [re]-hearing of the case. Our clients are suffering extreme and irreparable damages hence the anticipation of the case …"

On 20 July 2006, the applicants' legal practitioner of record responded to 1st and 2nd respondents' legal practitioners and copied the response to the Registrar, in the following terms:

> "We refer to the above matter. We have accidentally had a chance sighting of your letter of 18th of July 2006 addressed to the Judges' Clerk on this matter. While we are disturbed by the contents and suggestions therein we opine it best for your good-selves to adopt <u>to the letter</u> the proper manner of set down of such matters as envisaged by Form No. 29C (provisional order). We trust that in light of this you shall withdraw your letter …"

My brother Judge set down the matter for 31 July 2006 at 1415 hours. He was not available on that date and he referred the matter for my consideration. Due to earlier commitments I was unable to deal with the matter on that date resulting in its postponement to 7 August 2006. A careful reading of the above terms of the provisional order, to some extent, points to a misunderstanding of the nature and scope of the interdict in the judicial process. It is trite that of all legal remedies,

interlocutory interdicts are the most flexible, the most drastic, often the most attractive, and, potentially, the speediest of remedies – *The Law and Practice of Interdicts*, C B Prest at p 1 and *Interlocutory Injunctions*, R J Sharpe, 185. The learned author C B Prest, *supra*, however observed –

> "The appeal of the interdict lies in the speed at which it may be obtained. The dichotomy, which emerges, however, is that the speed with which the order is sought by the applicant is often matched by considerable caution on the part of the judge called upon to make the order. The effect of this dichotomy, and the effect of the process in general, is frustration: on the part of the applicant who wants an immediate order; on the part of practitioners who must prepare and present the case in haste; and on the part of the court which is called upon to give a decision on conflicting and untested evidence, on occasion without full and complete argument, and often without mature consideration."

It is common knowledge that in our jurisdiction applications for interlocutory relief have increased in number and complexity. From the look of things, the pressure on the courts is unlikely to decrease. Maybe, it is time our courts devise a means whereby they would be relieved of the burden of having to resolve, at an interlocutory stage of litigation, conflicts of evidence on affidavit and to decide difficult questions of law which call for detailed argument and mature consideration. The House of Lords sought to do so in *American Cyanamid C*o v *Ethicon Ltd* [1975] 1 ALLER 504 (HL) by enunciating a rule of practice. The rule recognises that the object of the interlocutory interdict is to protect the plaintiff against injury resulting from violation of his rights, but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights. The court must weigh one need against another and determine where the balance of convenience lies. Be that as it may, this case has to be determined in terms of the traditional approach where the applicant has to establish a *prima facie* case of breach of duty by the

respondent – i.e. a "strong *prima facie* right" test – *Setlogelo* v *Setlogelo* 1914 AD 221; *Eriksen Motors (Welkcom) Ltd* v *Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691 and *J T Stratford & Son Ltd* v *Lindley* [1964] 3 ALL ER 102 (HL). *In casu,* the order was granted against the respondents *ex parte*. According to Mr *Mazibisa*, for 1st and 2nd respondents, his above-mentioned letter should be under understood as a notice to anticipate the return day. It is strictly speaking not a notice or is it? It alluded to "anticipation" but confused the issue by using "[re] hearing". Mr *Nzarayapenga,* for the applicant made an issue out of this i.e. in his letter and in his submissions. We now know that the intention was to anticipate the return day. Mr *Nzarayapenga* is raising a technical objection. It is trite that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with expeditious and, if possible, inexpensive decision of cases on their real merits – *Trans-African Insurance Co Ltd* v *Maluleka* 1956 (2) SA 273 (A) at 278G; *Union Government and Fisher* v *West* 1918 AD 556 at 573 and *Safcor Forwarding (Pty) Ltd* v *N T C* 1982 (3) SA 654 (AD) at 673B-C. I do not see any prejudice here. In the South African Supreme Court Rules, R 6(8), any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice. We, according to my quick investigation, do not have a similar rule, so the anticipation of the return date will largely depend on this court's discretionary powers. These discretionary powers must, however, be exercised on a

judicial basis, that is to say, not arbitrarily or capriciously but on sound principle and for substantial reasons – *Francis* v *Roberts* 1973 (1) SA 507 (RA) at 513H-514D and *Ex Parte Neethling & Ors* 1951(4) SA 331(A) at 335E-F. In this case, the 1st and 2nd respondents gave the applicants timeous notice to oppose which was filed together

with their opposing affidavit. The applicants had access to these papers for almost 13 working days. They thus had ample opportunity to reply by way of an answering affidavit if they so desired. It is the applicants who approached the court under certificate of urgency so such anticipation of the return date should also be in their interests. The applicants cannot, after obtaining a provisional order, suggest that the matter should be slowed down. Mr *Nzarayapenga*, has rightly conceded that there is no legal persona known as "Estate late George Utaumire" as no such estate has been registered with the Master of this Court. Further, he conceded that 2nd applicant is the "second wife" and that she has not been appointed executor. Further, in a letter dated 13 July 2006, written by Mr *Nzarayapenga* to Mr *Mazibisa* another concession is evident –

> "… We do appreciate the fact that lease agreement was in Mr Utaumire's name personally and the rights occurring there from cannot be inherited but we request you to consider the following …" (What follows are terms of a new agreement)

Notwithstanding that the applicants are armed with a provisional order (with interim relief), it does not place an unwarranted onus on the respondents. All that the provisional order does is to require the respondents to appear and oppose should they wish to do so. The overall onus of establishing their case remains with the applicants and the provisional order does not cast an onus upon the respondents which they not otherwise bear – *Safcor Forwarding (Pty) Ltd* v *N T C, supra*, at 676A. Looking at these concessions and the new facts highlighted above it is possible that the *ex parte*

provisional order was erroneously granted. The applicants will clarify this in the answering affidavit. It is trite that were an interdict has been erroneously granted, the court will discharge it on the return date – *In Re The South Coast Junction Literary*

Association & J H Guy (1908) 29 NLR 47 and *The Law and Practice of Interdict, supra* at 331. Taking all these factors into account, I think this is a case where I should evoke the provisions of Rule 4C(b) of the Rules of the High Court of Zimbabwe, 1971 in order to give directions on the anticipation of the return date. Such directions are what I deem to be just and expedient in the circumstances.

Accordingly, it is hereby ordered that:

1. The applicant is given until 1630 hours on 16 August 2006 to file an answering affidavit, if she so desires and serve the same on the 1st and 2nd respondents.
2. The 2nd applicant files her heads of arguments by not later than 1630 hours on 21 August 2006 and 1st and 2nd respondents by not later than 1630 hours on 22 August 2006.
3. The matter is set down for hearing before the duty Judge on 25 August 2006 at 1000 hours.
4. Costs shall be costs in the cause.

Dube & Partners, applicants' legal practitioners
Cheda & Partners, 1st and 2nd respondents' legal practitioners