**TIMESERVE ENGINEERING (PVT) LTD**

**Versus**

**READPRINT PRINTERS (PVT) LTD**

**And**

**BRANCH MANAGER, STANBIC BANK,**
**SOUTHERTON BRANCH – HARARE**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 FEBRUARY 2006 AND 22 MAY 2008

*M Makonese*, for the applicant
*H Shenje*, for 1st respondent

Opposed Application

**NDOU J:** On 5 December 2005 the applicant obtained, *ex parte*, a provisional order. The applicant seeks the confirmation of the said order into a final order. The terms of the final order sought are the following:

> "That you show cause to this honourable court why a final order should not be made in the following terms:
>
> 1. That the sum of $1.5 billion held by the 2nd respondent transferred by an interbank transfer from Commercial Bank of Zimbabwe into account number 0140028554402 be paid to the applicant's legal practitioners, Makonese & Partners, to be held by them in trust in an interest bearing account pending the determination of this matter.
>
> That 2nd respondent be and is hereby directed not to authorise withdrawal by the 1st respondent of the said sum of $1.5 billion pending determination of the application.
> That 1st respondent shall pay the costs of this application."

The background facts of the case are the following. The applicant's case can be summarised as follows. On or about 23 November 2005, the applicant's Managing Director Richman Tapfuma [deponent to the founding affidavit] received a

telephone call from the 1st respondent. The 1st respondent indicated that it was acting on behalf of another party who was selling a certain unnamed developed property in Harare. 1st respondent indicated that the seller was desperate for money and in order to secure the property the applicant has to deposit a sum of Z$1,5 billion. The arrangement was that the applicant's Managing Director would, after paying the deposit, come and view the merx at his own time. Even before viewing the property being sold, the applicant, on 24 November 2005, instructed its bankers, CBZ, Kwekwe to effect an interbank transfer of the sum of $1,5 billion to 1st respondent's account with the 2nd respondent. The applicant's Managing Director deposed the fact that the applicant has since discovered that the 1st respondent has no property to sell to it in Harare and that the entire transaction was a fraud. The applicant's case is that it was taken for a ride so to speak. Having presented such a case in its founding affidavit, the applicant obtained a provisional order, *ex parte* [under a certificate of urgency] on 5 December 2005. The provisional order was served on the 1st respondent on 7 December 2005. 1st respondent filed its notice of opposition on 15 December 2005. In its opposing affidavit the 1st respondent's case is outlined as follows. During the period in question applicant's Managing Director was in South Africa to buy certain materials for his company. He made an oral request through one Maxmore Marufu to be advanced foreign currency in the form of South African rands for purposes of buying the materials. This was done and the applicant was advanced money in South African rands equivalent to the Z$1.5 billion. The applicant, pursuant to the transaction concluded in South Africa then made a transfer from its CBZ account to the Stanbic Bank account of the 1st respondent. The amount transferred is a genuine amount equivalent to the foreign currency advanced as per the parties agreement.

After being served with the opposing papers the applicant did not file its answering affidavit not did it set the matter down for confirmation. The applicant only acted when the 1st respondent filed an application seeking directions of this court.

From the papers it is clear that the applicant obtained the provisional order based on the contention that it had been swindled in the sum of $1,5 billion as a result of certain fraudulent misrepresentations regarding the sale by the 1st respondent, on an undisclosed Harare immovable property. Without giving the slightest hint about who within 1st respondent's ranks, the applicant had had contacts in respect of that

sale, applicant claimed to have hurriedly parted with the sum of Z$1,5 billion on the strength of the "representations that had been made." The applicant's founding affidavit was lacking in details. There was no mention of South African transactions. Now, in its answering affidavit the applicant has since placed the following facts consistent with the 1st respondent's argument. Applicant now states:

(a) that there was a "fake" transfer in South Africa, Annexure "C", in terms of which it had been purportedly transferred ZR260 000,00 into a Nedbank Account on 22 November 2005.

That it was advised of a reversal of that credit by the bank immediately after transferring the sum of Z$1,5 billion into the 1st respondent's Stanbic Bank account, Annexure "B" and,
That he indicated on the transfer forms that the reason for the payment was a "house", Annexure "C".

For a start, the applicant has been in possession of Annexures "A", "B" and "C" at all material times and in particular, at the time of filing this urgent application. It is apparent that contrary to the applicant's earlier assertions there was no sale of an immovable property but there was foreign currency transaction or arrangement explained by the transfer of funds simultaneously, in South Africa and Zimbabwe. This arrangement appears, *prima facie*, to be tainted with illegality i.e. violations of the Exchange Control Act [chapter 22:05] and/or regulations made thereunder. The reason why there is nothing to show for the "house" is because this was a design to clothe some semblance of legality to what was otherwise an illegal deal. The applicant was aware of such illegality and was a willing party to it. Assuming that the applicant was cheated by 1st respondent is this illegal transaction he had to be open with the court that that is the case. Two wrongs do not make a right. The applicant should have been truthful on what transpired. In any event, it is trite that the court may relax the *par delictum* rule in order to do simple justice between man and man – *Dube* v *Khumalo* 1986(2) ZLR 103 (S) at 109D-G; *Tajbhay* v *Cassim* 1939 AD 537 at 544-5 and *Logan* v *Sibiya* 2002(1) ZLR 531 (H). Applicant should have acted in good faith and disclosed fully their transaction even though it is tainted with illegality. Instead the applicant sought to mislead the court by withholding material facts. The court should frown on an order obtained, *ex parte*, on incomplete and misleading information – *Graspeak Investments (Pvt) Ltd* v *Delta Operations (Pvt) Ltd* 2001 (2) ZLR 551 (H) and *ex parte Madikiza et uxor* 1995 (4) SA 433 (Tk) at 436I-J. For the above reasons the application must fail.

Accordingly, the provisional order issued by this court on 5 December 2005 is

discharged with costs.

*Makonese & Partners*, applicant's legal practitioners
*Shenje & Company*, 1st respondent's legal practitioners