CENTRAL AFRICAN BUILDING SOCIETY
versus
MATHIAS NDLOVU
and
GLADYS NDLOVU

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE 15 December 2005

Urgent application

Mr *Willsmer* for the applicant
Mr *Hogwe* and Ms *Mutsvangwa* for respondents

CHATUKUTA J: This is an urgent application for a temporary anti-dissipation interdict to restrain the respondents from dissipating their assets for the purpose of avoiding due execution of a judgment for $154 billion which applicant expects to obtain against the respondents in due course.

Mr Willsmer filed a certificate of urgency. A summary of the submissions in the certificate are:

"a) 1st respondent has shown a propensity "with reckless abandon" to make "wild and extravagant" purchases of various assets such as properties, vehicles businesses and shares and other assets. On that basis 1st respondent "cannot be trusted to deal soberly and maturely with the assets in question.".
b) The prospects of respondents being convicted and incarcerated are very high in respect of criminal charges against respondents. Both respondents would require money for the upkeep of their families when they go to prison and for the payment of legal fees. This is seen by the applicant as a real incentive for respondents to dissipate their assets.
c) 1st respondents have been given an opportunity to make good the loss suffered by applicant and to assure applicant that he will not dissipate the assets, to no avail.
d) 1st respondent has concealed from the police another three vehicles that he had purchased. This information was provided by applicant just before hearing of the application."

Applicant is required to satisfy the court that irreparable harm may be suffered by applicant if the matter is not dealt with urgently and that applicant must have treated the matter urgently. Applicant has failed to satisfy either of these requirements.

I do not believe that applicant will suffer any irreparable harm if the matter is dealt with as an ordinary application. Firstly, annexed to the application is a list of 16 vehicles 1st respondent is alleged to have procured using the proceeds of crime and which he may dissipate. Of interest is the fact that all the vehicles are indicated by applicant to be located at Chikurubi. The cars were seized by and are in police custody. How applicant will dissipate the vehicles eludes the mind. Mr Willsmer submitted that applicant could sell the vehicles and would only have difficulties in effecting transfer. Who would be so stupid as to purchase motor vehicles such as Mercedes C240, BMW 3.16i, without sight of the actual vehicles and make payment for same. What harm can applicant suffer when the assets he wants to be protected are in police custody and there is no possibility of charges being withdrawn? Mr Willsmer was very confident in his certificate of urgency that respondents will be convicted.

Secondly, applicant seeks to rely on press reports which he has annexed to his application that disclose under-dealing by Hogwe, Dzimirai and Partners. In these reports, dated 30 November 2005, 3 December 2005 and 5 December 2005 it is disclosed that the police has recovered $62 billion in 1st respondent's Platinum Savings Account and $10 billion invested with FBC Bank. Applicant has not challenged the accuracy of this information and in fact accepted when questioned by the court on the recovery of the $72 billion. This is also confirmed in paragraph 4.17 of 1st respondent's opposing affidavit. It therefore follows that out of the $154 billion applicant is suing respondents for, 1st respondent cannot, as it were, touch $72 billion leaving a balance of $82 billion. Already there are 16 vehicles in police custody and two houses and the total value of that property is place by the 1st respondent at $118 000 000 000. Applicant disputes the values placed on the property by respondent but does not offer any value in rebuttal. In any event, as submitted by Mr Hogwe, the amount claimed is disputed and may be further reduced from the $430 billion 1st respondent is initially alleged to have swindled the applicant and the $154 billion applicant is suing for.

Lastly, it is interesting to note that 1st respondent in fact offered, in the letter by Hogwe, Dzimirai and Partners dated 28 November 2005 and annexed to the application, a proposal to:

> "2..... settle the overdraft balance by either ceding the assets listed in paragraph 5 hereunder at agreed values or selling the assets with your supervision and the proceeds thereunder to go toward payment of the overdraft balance.
>
> 3. That the proposals for payment of any balance that might remain outstanding thereafter shall be determined by the values realized from the assets or agreed as the case may be."

This letter was written three days after the alleged offence by respondents came to light. This is not an indication of a person who wants to dissipate assets and cause irreparable harm through irresponsible disposal of assets as submitted by applicant.

Regarding the second requirement, applicant has not treated this matter as an urgent matter. The communication between 1st respondent and applicant's lawyers was very swift between 28 and 30 November 2005 reflecting a sense of urgency between the parties:

- 28 November-Mr Hogwe to CABS proposing settlement of overdraft
- 29 November 2005-response by Mr Willsmer advising Mr Hogwe that summons were to be issued shortly "to protect our client's position" and also suggesting the parties meet
- 29 November 2005-response by Mr Hogwe reiterating 1st respondent's proposal to settle and highlighting possible anomalies in the computation of applicant's prejudice
- 30 November 2005-response by Mr Willsmer indicating that discussions between the parties would only be held if and when 1st responded gave Mr Hogwe authority to accept service of process on his behalf
- 30 November 2005 another letter by Mr Willsmer giving 1st respondent an ultimatum, by close of business on that day, to assure applicant that he was not going to dispose in any way his assets pending settlement of the overdraft

There is no indication in the application whether or not 1st respondent responded to the last letter. The verve shown in the three days from 28 t0 30 November 2005 suddenly disappeared. No action appears to have been taken by the applicant until 5 December 2005, even after the ultimatum on 30 November 2005. This lack of verve, considering that 1st respondent had initiated the communication, should have sent signals to applicant that the ultimatum given on 30 November 2005 had fallen on deaf ears and it was time to act. In fact, during all this communication applicant was not even concerned about dissipation of assets despite 1st respondent's "reckless abandon, both in wrongfully acquiring huge amounts of money from applicant and in making wild and extravagant purchases of properties.....". Applicant wanted to issue summons first and not to prevent dissipation of assets. Applicant wanted to hold meetings with the 1st respondent. This is not an indication of a person fearful that assets are going to be dissipated and cause applicant irreparable harm. Applicant started showing an interest to avoid dissipation on 30 November 2005.

After 30 November 2005, applicant, without the assurance that 1st respondent was not going to dispose of or alienate assets proceeded to issue summons suing respondents for $154 billion. On 9 December 2005 Wintertons filed applicant's Declaration. The urgent application only came on 13 December 2005.

Applicant explained the delay in filing the application. This is the explanation in the Founding Affidavit:

> "26 The task of investigating and auditing First Respondent's activities in relation to his accounts and establishing what he has purchased has proved a mammoth one.
>
> 27. Applicant has been liaising with the Zimbabwe Republic Police investigating officers in charge of the criminal prosecution of First Respondent in this regard but the task has been made more difficult by the fact that there were only two investigators and they had transport problems.
>
> 28. In addition, the police investigation has now come to a halt. I attach a copy of the Herald's article of the 9th December 2005 in this regard.

29. For the reasons given above, it has been impossible to prepare and file this Application."

What the above means is that had the police investigations continued, this application may not have seen the light of the day. As per the press report of 3 December 2005, the Police had already identified "14 brand new luxury vehicles, two houses in Harare's upmarket suburbs of Gunhill and Greystone Park." They had already recovered the $72 billion. But applicant had to wait for the article in The Herald of 9 December to make an urgent application on 13 December. Such an explanation for the delay in filing the application is not acceptable.

Applicant sought to rely on a supporting affidavit filed on 15 December 2005 (after the filing of the urgent application on 13 December 2005) as an example of how deceitful 1st respondent is. All the vehicles were purchased before 1st respondent's arrest. Three of the vehicles are already with the Police at Chikurubi. First respondent submitted that he had not yet taken delivery of the other three vehicles and therefore did not conceal anything from the Police. Applicant cannot rely on the purchase of these vehicles in support of his urgent application. At the time he filed his urgent application, he was not aware of the purchases and therefore would not and did not rely on those purchases in making his application.

This is one of the cases referred to by CHINHENGO J in *Kuvarega v Registrar-General and Anor* 1998 (1) ZLR 188 at 193E-H where practitioners certify that a case is urgent when it is not. This is a case which would deserve an award of costs *bonis propris*. Mr Willsmer is luck that respondent did not make any submissions on costs.

The application is accordingly dismissed with costs.

....., applicant's legal practitioners

....., respondent's legal practitioners