ARTUR FERNANDO PEREIRA DIAS
versus
DAWID JOHANNES ERASMUS
and
ZHAOSHENG WU
and
YAN YU
and
ERASMUS ACCOUNTING & EXECUTOR SERVICES (PVT) LTD
and
SHOMET INDUSTRIAL DEVELOPMENT (PVT) LTD
and
THE REGISTRAR OF COMPANIES

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE

Urgent Chamber Application

O Mushuma, for the applicants
R Harvey, for the 1st and 4th respondents
T Hussein, for the 2nd, 3rd and 5th respondents

GOWORA J: The applicants are father and daughter. In 1978 a company called Monomotapa Garden Furniture (Pvt) Ltd was incorporated. The first respondent subscribed to 950 shares in the said company and one Mukopi Ushahwengavi subscribed to another 50. In 1999 the later died and his shares were then acquired by the second applicant. The first applicant and the minority shareholder were the directors to the company and when Ushwahwengavi died the second applicant was appointed director by virtue of being a shareholder.

In about June or July 2005 the first applicant on his own behalf and also acting as agent for the second applicant entered into an agreement with second and third respondents who were also representing the fifth respondent in which he disposed of the entire shareholding in Monomotapa Garden Furniture, (the company) at an agreed purchase price of US$400 000. Although the purchase price was meant to have been paid with four months of the agreement payment was not effected with the result that new terms for payment were negotiated not once but twice according to the applicants. The applicants contend that due to the failure by the respondents to effect payment either in terms of the original agreement or the renegotiated terms, they verbally

cancelled the agreement on 24 November 2008 and demanded that the respondents vacate the applicants' immovable property and return the assets that had been handed over at the time of the agreement.

Despite the cancellation the applicants appear not to have taken any further steps against the respondents, as the first applicant avers in the founding affidavit that on 30 November 2009 he approached his legal practitioners and on his instructions they formally terminated the agreement in writing by letter dated 7 December 2009. On 8 December 2009 the respondents' legal practitioners wrote to the applicants' legal practitioners indicating that the respondents had paid US$300 000. This letter was responded to on 6 January 2009 disclaiming any receipt by the applicants of the purchase price. The end to all this was that summons was instituted by the applicants against the respondents under Case No HC 2480/10 issued on 16 April 2010. In the meantime however, the respondents had issued summons against the applicants and the company on 10 March 2010 claiming delivery of the company documents and title deeds to the immovable property. Following receipt of a request for further particulars from the respondents' legal practitioners to the summons issued by the applicants, the applicants instructed their legal practitioners to peruse the records relating to the company at the offices of the sixth respondent and made a number of discoveries which then propelled the applicants into filing this application on an urgent basis.

The grounds of urgency being relied on are the following:

a) That the applicants had written to the respondents in relation to certain alleged irregular transactions but the respondents were not forthcoming and had not produced documentary evidence supporting the said transactions
b) That the purported appointment of first, second and third respondents as directors and the purported removal of the first applicant as director if not declared null and void by the court would have adverse and critical ramifications in so far as the applicants' interest in the company was concerned. It was stated in the certificate of urgency that there was danger that the respondents would be tempted to act as directors and shareholders of the company and dispose of assets belonging to the company as well as alienating the shareholding.
c) That the respondents had, through their activities paralysed and incapacitated the company as well as the directors and shareholders of the company. It was stated that the situation was extra-ordinary requiring an extra-ordinary and speedy response to the put an immediate halt to the illegitimate activities of the respondents.

d) That the situation, if allowed to subsist and flourish for yet another day constituted an affront to all notions of justice and is contrary to public policy and that faced with a situation as this the law must and should respond swiftly to address the situation in a decisive way

I was sufficiently moved by the sense of urgency displayed in the certificate to have the matter set for hearing before me on an urgent basis. The respondents all filed opposing papers and all took issue with the contention that the matter was urgent. The respondents also contended that the applicants were peregrini and were therefore obliged to file and lodge with the court security for costs. I will therefore proceed to deal with the points *in limine seretiam* below.

Urgency.

It was contended by *Messrs Hussein* and *Harvey* that the transactions complained of had occurred on 15 April 2005, which is a document purportedly signed by the first and second applicants. Indeed in para 12 of the founding affidavit there is confirmation that the alleged agreement occurred in 2005. The paragraph further confirms that the entire shareholding in the company was sold to the respondents in or about June or July 2005. The second, third and fifth respondents have attached to their opposing papers a declaration filed by the applicants under Case No HC 2480/10. In paras 6 and 8 of that declaration the applicants aver:

> "In or around June/July 2005, and at Harare, the second plaintiff, in his capacity as director and shareholder of the first plaintiff and also agent of the third plaintiff entered into an oral agreement with the first defendant, duly represented by the second and third defendants, in terms of which the second and third plaintiffs sold their entire shareholding in the first plaintiff company including the business of the company as a going concern to the first defendant
>
> It was also agreed that the first defendant, through the agency of the second and third defendants, would assume with immediate effect, full control of the first plaintiff company and all its assets, which they duly did, including particularly running the first plaintiff company's factory for their benefit using the first plaintiff's stocks, business bank balances and labour. This was agreed to and implemented in anticipation of payment of the purchase price in full within four months as averred herein."

The averments in para 8 are a pointer as to the extent that the applicants surrendered control of the company and business to the respondents. Full control of a company can only refer to the persons in control having been appointed directors in the companies as that is the vehicle through which a company is run. On 10 January 2010, the first respondent had sent an e-mail to the first

applicant advising him of the sale effected on 15 April 2005 and the implications thereof. The first applicant demanded sight of the document in question and it was sent to him. He took no action.

From the above it is clear that what is contained in the certificate of urgency on the alleged illegal acts of the respondents having been fraudulently appointed directors of the company is not borne out by the record especially pleadings filed on behalf of the applicants themselves in the main cause. It is also clear that it is not news to the applicants that the second and third respondents have been running the affairs and business of the company clandestinely. They were given full control. As for the applicants just having discovered these alleged irregularities is again not borne out by the record. By 11 January 2010 the disputed document of 15 April 2005 in terms of which disposal of the shares and assets of the company had been effected had been sent to the first applicant and he took no action. It took him almost four months to issue summons for a vindicatory action and another month before launching an application to interdict the respondents from running the affairs of the company and posing as directors.

These courts have time and time spelt out the requirements to be met by an applicant seeking to have his matter jump the queue and have such heard on an urgent basis. Every litigant would wish to have his or her matter heard on an urgent basis. It is for that reason that the rules provided for discretion on the part of the judge to decide whether or not the matter is urgent. There are no set criteria for the determining of urgency in relation to a matter and it is often difficult for judges to decide before setting down the matter whether or not it is urgent. Equally legal practitioners and their clients use the arrival of on the doorstep of the client crisis as the reason for having the matter heard on an urgent basis. However, not every crisis can be considered urgent as a lot of factors have to be taken into account by the judge in deciding urgency. Where a litigant has been aware for some time of the existence of facts or a set of circumstances that could be detrimental to his interest, it cannot be justified for that party to allow those same circumstances to gather momentum until a crisis is reached and thereafter cry foul and demand a hearing from this court on the alleged grounds that the matter is urgent. In such a case the urgency has been self created. A party should not wait to seek relief from the court until the eleventh hour and expect that the court would grant him the indulgence of having his dispute jump the queue and be heard urgently.

The arrival of a crisis on his doorstep is not the only benchmark the court has to consider in determining the question of urgency. As to urgency, each case must be judged upon its merits

facts surrounding the application must such that the urgency is evident from the certificate and the founding affidavit. The existence of a catastrophe or an imminent crisis on its own, cannot and should not be basis upon which urgency id determined. A set of circumstances which to the knowledge of the applicant or his legal practitioners have existed for a period of time no matter how devastating the facts and the effect of their existence may be, cannot be considered to constitute urgency especially where it clear that the applicant or his legal practitioner did themselves not react with urgency when the circumstances became evident. The urgency of the situation in my view must also be exhibited by equally urgent reaction on the part of the applicant.

In *casu,* the first applicant if he is to be believed, was aware by the middle of January 2010 that the respondents were passing themselves off as directors to the company. That is the time when he should have been spurred to act. He did not. He issued summons cancelling the agreement and demanding the eviction of the respondents from the immovable and it was only after being served with a request for further particulars that it occurred to him and his legal practitioners that there was need to stop the respondents from acting as directors to the company, and this coming almost five years after the respondents had been given full control of the company is hard to comprehend. I agree with the submissions by counsel for the respondents that this matter is not urgent and the application ought to fail on that score alone. There is however another preliminary issue raised which I should dispose of before concluding the matter.

The respondents have also contended that the applicants are *peregrini* and as such they should have provided for security for costs for the respondents. The applicants deny that they are peregrine. As such they are not obliged to provide security. I think the first rung is to determine whether or not the applicants are peregrine as averred by the respondents. In an answering affidavit the applicants have filed with the court a Deed of Transfer in respect of an immovable property which is jointly owned by the first applicant and one Liliana Dias who is stated to be his wife. She however is not before me. In addition to this there is an electricity bill dated 14 January 2010 in the name of Liliana Dias, a telephone bill in the name of Chantelle Dias and an account from a security firm in the name Mr L Dias. Lastly there is a Special Power of Attorney executed by the two applicants on 3 May 2010 at Cape Town and giving one Lilian Dias living in Harare power of substitution to handle their affairs relating to Monomotapa Garden Furniture (Pvt) Ltd.

Another power of attorney had been granted to the same L Dias on 1 May 2010 to peruse the documents relating to the same company.

The opposing affidavit filed by the first respondent in fact suggests that the applicants are resident in South Africa. There is however sufficient dispute on the residency of the applicants arising from the documents that I am unable to state categorically that they are peregrine. In any event I do not consider it necessary to determine this particular point in view of my finding that the matter is not urgent.

Accordingly in view of the lack of urgency displayed herein I find that the matter was not properly filed and the application is accordingly dismissed with costs.

Oliver Mushuma, applicants' legal practitioners

Granger & Harvey, respondents' legal practitioners