BIRCH WILLIAMS
versus
MARIA KATSANDE
and
DELITTE PRODUCTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20 August 2010

Urgent Chamber Application

I. Ndudzo, for applicant
C. Nhemwa, for both respondents

MAWADZE J: Applicant seeks a provisional order in the following terms:-

"Terms of the provisional order granted

1. Respondents be and are hereby ordered to forthwith hand over a property listed in Annexture 'B' to the founding affidavit to the applicant upon service of this order.

1(a) In the event of the respondents refusing or forbidding to comply with the terms of para 1 above, the Deputy Sheriff be and is hereby authorized to retrieve the said property from the respondents' property and deliver it to the applicant.

2. Respondents are required to account for one applicant's property sold prior to 14 of July 2010 and to handover all proceeds of such sales to the applicant within 48 hours of service of this order.

3. Leave is given to the applicant's attorney to serve a copy of this order".

The terms of the final order sought are constructed as follows:-

"Terms of the final order sought

1. It is hereby declared that the property listed in annexture 'B' attached to the founding affidavit is the exclusive property of the applicant.

2. Respondents be and are hereby ordered to pay costs of suit on legal practitioner client scale"

The brief facts of the matter can be briefly stated as follows:-

The applicant conducts the business of interior and exterior decorations and sells diversified specifically designed household goods and effects. On or about October 2009 the applicant entered into negotiations with the first respondent who was allegedly representing

herself and the second respondent. It was agreed that that the first respondent through the second respondent would act as an agent of the applicant. The nature of the agency relationship was that the applicant would supply the respondents with goods for sale which would be sold on applicant's behalf by the respondents who would in turn receive 20% commission on any goods sold. On 14 July 2010 the applicant wrote to the respondents cancelling the agency agreement alleging improper conduct and breach of the material term of the agreement between the parties by the respondents. The second respondent by way of letter on 15 July 2010 confirmed the cancellation of the agency agreement but sought to remain in possession of the property listed in Annexture 'B' until a certain date and that the respondents be paid certain amounts due arising from the applicant's cancellation of the agreement. Applicant persisted in demanding to be handed over the property in Annexture 'B' valued at US $116 627.50 but the respondents refused indicating that certain conditions should be met. When the applicant visited the respondent's shop on 13 August ostensibly for a stock take the applicant was denied access into the shop. Applicant alleges that some of the property had been removed from the shop and property valued at about US $100 000-00 was no longer in the shop. Applicant's fear was that the respondents were disposing of the applicant's property hence causing possible irreparable loss to the applicant. Applicant then approached this court, on a certificate of urgency, praying for the interim relief already alluded to. This application is opposed.

Mr *Nhemwa*, for the respondents raised three points *in limine* two of which he argued are capable of resolving the matter without even going into the merits of the application. The points *in limine* are firstly that the certificate of urgency is defective, secondly that the first respondent is improperly cited and thirdly that the matter is not urgent. I propose to deal with the points *in limine* first.

That first respondent is improperly cited

Mr *Nhemwa* in argument stated that it was improper to cite Maria Katsande as the first respondent in these proceedings in her personal capacity as the agency agreement was between the applicant and the second respondent. He argued that the first respondent despite being both a shareholder and director of the second respondent should not be party to these proceedings in her personal capacity. Mr *Nhemwa* submitted that the second respondent is a duly registered company in terms of the Companies Act [*Cap 24:03*] and has a separate legal persona distinct from the first respondent. On the other hand Mr *Ndudzo* countered that the first respondent was properly cited as she is the one who negotiated the agency agreement on her own behalf and that of the second

respondent. Mr *Ndudzo* submitted that first respondent at no stage produced a resolution from the Board of Directors of the second respondent indicating that she was acting on behalf of the second respondent.

Reference was made to the case of *Madzivire & Ors v Zvarirwadzwa & Ors* 2005 (2) ZLR 148 (H) in support of Mr *Nhemwa's* argument. My view is that this case is irrelevant to the point in issue as it dealt primarily with the right of individual directors or shareholders to bring action on behalf of the company. It is common cause that the second respondent *prima facie* is a duly registered company in terms of the Company Act [*Cap 24:03*]. I say *prima facie* because the applicant did not contest this point although the certificate of incorporation attached as Annexture 'A' to second respondent's opposing affidavit is unsigned by the Registrar of Companies and is a photocopy. Section 9 of the Companies Act [*Cap 24:03*] provides as follows:-

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers".

In the absence of any basis to pierce the corporate veil I would agree with Mr *Nhemwa* that there would be no proper basis in law to cite the first respondent in these proceedings in her personal capacity albeit, being both a director and shareholder of the second respondent. Accordingly the first point *in limine* is upheld. However this would not dispose of the matter as the second respondent remains party to the proceedings.

Certificate of Urgency

Mr *Nhemwa's* submissions in this regard is that the court papers filed by the applicant are not in order as the certificate of urgency was prepared by one *Tamuka Moyo* a legal practitioner with the law firm Mutamangira & Associates who are acting as the applicant's legal practitioner. This argument is based on the ratio formulated by CHEDA J in *Chafanza v Edgars Stores & Anor* 2005 (1) ZLR 299 wherein at 300G the learned judge said;

> "To my mind, it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such a lawyer clearly has an interest in the matter at hand"

It is quite apparent that legal practitioners have not taken heed of the learned judge's advice as in many urgent applications brought before this court the ratio formulated in Chafanza case *supra* is ignored and invariably judges have been asked to deal with this aspect in most urgent chamber applications.

I am aware that there has been no unanimity in this court as regards the correctness of the ratio formulated in Chafanza case *supra*. To my knowledge the Supreme Court has not

pronounced itself on this issue. The two divergent views emerging from this court can be illustrated by a few cases dealt with by my brother and sister judges as shown below.

In the case of *Attorney General v Chiringa Estate & Ors* HC 659/10 KUDYA J at p 3 of cyclostyled judgment came to the conclusion that the Chafanza case was made by a panel of two judges of concurrent jurisdiction with the learned judge and that in line with the principle of *stare decisis*, a single judge is bound by a determination made by a panel of two or more judges of concurrent jurisdiction. The learned judge was not persuaded to depart from the ratio *decidendi* in Chafanza case.

In the case of *Route Toute BV & Ors vs Sunspun Bananas (Pvt) Ltd & Anor* HH 27-2010 CHATUKUTA J took virtually a different view from that of KUDYA J. On p 3 of the cyclostyled judgment the learned judge had this to say:-

> "I am persuaded by Mr *Chikumbirike's* submission that the rules do not prescribe that a legal practitioner who signs an urgent certificate must not be from the same firm that represents the applicant in that matter. Rule 242 (2) simply prescribes that where an applicant is legally represented in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application. As Mr Mlotshwa conceded, the decision in Chafanza case is not binding. It is my view that there is no conflict of interest. Even if there was such conflict, it does not seem that the conflict would render the application not urgent. I am therefore of the view that nothing much turns on the propriety of the certificate of urgency".

It is apparent therefore that the reasoning by CHATUKUTA J is in conflict with the view clearly expressed by KUDYA J in the *Attorney General v Chiringa Estate (Pvt) Ltd & Ors supra*. The pertinent issue which remains unresolved after considering these two cases is whether irrespective of what the correct interpretation of R 242 (2) is this court is not bound by the decision in Chafanza case on the basis of the principle of *stare decisis* as that decision was made by a panel of two judges.

In the case of *African Consolidated Resources & Ors v Minerals Marketing Corporation of Zimbabwe & Ors* HC 2238/10 PATEL J had the privilege of comparing the apparently conflicting conclusions arrived at by KUDYA J and CHATUKUTA in the cases already alluded to. At p 4 of the cyclostyled judgment the learned judge had this to say:

> "While I am prepared to accept that the certificate of urgency in this case is improper and undesirable but not fatally defective, I might still be persuaded to strike this matter off the roll for want of compliance with the Rules as construed and applied in Chafanza case. However, it is not necessary for me to make any definitive decision on this point in light of the following determination of the question of urgency".

The approach by PATEL J in my view seems to be the middle of the road option as it were and is not in direct conflict with the conclusions arrived at by both KUDYA J and CHATUKUTA J. However in the case of *Ngoni Mudekunye and Ors v Garon Evans Mudekunye & Ors* HH 190-2010 BERE J, after discussing the apparent conflicting views of KUDYA J, CHATUKUTA J and PATEL J came to the conclusion that decision in Chafanza case may not be in line with the correct interpretation of R 242 (2) and that it was not a decision made by a panel of two judges. After dealing with a number of relevant issues pertaining to the conflicting views on this matter BERE J at p 9 of the cyclostyled in the Ngoni Mudekunye case *supra* had this to say:-

> "There is no doubt that this is a sound legal principle in so far as it applies to affidavits (i.e. the ratio in Chafanza case). It is however doubtful if this same principle could be extended to a certificate of urgency as currently provided for in our r 242 which in my view is very clear in its requirements…….. My very strong view as highlighted is that this principle of law sound as it is cannot override a specific provision in our rules particularly where the rule itself has gone further to provide sufficient safeguards by giving the presiding judge the power to either confirm or dismiss the urgency of the matter irrespective of the existence of a certificate of urgency".

The definitive finding made by BERE J in the Ngoni Mudekunye case *supra* is captured as on pp 9 to 10 of the cyclostyled judgment as follows:

> "Coming to the case before me I am satisfied that there was nothing improper about Itai Ndudzo filing a certificate of urgency to certify the urgency of a matter which was being handled by his law firm. In my view this is what it should be. In fact it appears to me such a certificate is better and more informative document if prepared by the applicant's counsel. The point of objection raised *in limine* in this regard is not sustainable"

While I am prepared to accept the lucid reasoning in the judgment of BERE J I am unable to agree with the learned judge that the Chafanza case was not made by a panel of two judges of concurrent jurisdiction and that it is not binding to a single judge of this court. I am more inclined to agree with PATEL J that while on the basis of Chafanza case the certificate of urgency may under certain circumstances be deemed to be improper and that it may be undesirable for a legal practitioner to sign a urgent certificate for and on behalf of a client who is being represented by such a law firm, that on its own would not make the certificate of urgency fatally defective. The point *in limine* in this regard raised by Mr *Nhemwa* is therefore dismissed.

Urgency

The question of what constitutes urgency was aptly dealt within the case of *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188 at p 193 wherein the learned judge has this to say:-

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency…… What constitutes urgency is not only the

> imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non timeous action if there has been a delay". See also *Madzivanzira & Ors v Dexprint Investment (Private) Limited and Anor* HH 145-2002.

In *casu* the question of urgency is closely linked to the exact nature of the dispute between the parties. I am unable to agree with Mr *Nhemwa* that the dispute between the parties arose on 14 July 2010 when the applicant wrote the letter terminating the agency agreement. It is important in this regard to deal with the sequence and chronology of events to appreciate what ultimately was the dispute between the parties leading to this application.

In the letter dated 14 July 2010 the applicant did not seek the immediate return of the goods after terminating the agency agreement but stated as follows:-

"We again ask you to set a time in the next few days to enable us to collect our property".

In the letter dated 15 July 2010 the second respondent confirmed the cancellation of the agency relationship but sought to impose certain conditions which are summed up as follows:-

> "In the event that you want to immediately collect all the items please be advised that payment of anticipated commission is required first".

In fact in the letter dated 15 July 2010 the second respondent indicated that despite the cancellation of the agency relationship the applicant's goods will remain in the second respondent's shop and would continued to be sold as usual as per the cancelled agency agreement and that the second respondent would give monthly reports and make payments weekly to the applicant on the goods sold. The second respondent's argument was that the second respondent had already incurred costs on the goods in the shop and would not release those goods immediately. In my view it is the contradictory nature of the second respondent's letter which initially caused problems between the parties. The second respondent while confirming cancellation of the agency agreement still insisted that the *status quo ante* should remain.

The subsequent correspondence between the parties is instructive. After the second respondent's letter dated 15 July 2010 the applicant then wrote to the second respondent on 2 August 2010 indicating that the applicant would collect the goods on 3 August 2010 at 1500 hrs irrespective of the second respondent's concerns raised in this letter dated 15 July 2010. However when the applicant visited the second respondent's shop on 3 August 2010, the second respondent locked the shop and refused to handover the property. In a letter dated 5 August 2010 the applicant

protested to second respondent about events of 3 August 2010 and proposed to collect the goods on 16 August 2010. However before that date and on 6 August 2010 the second respondent wrote to the applicant reiterating the second respondent's unwillingness to surrender the goods as proposed on 16 August but to surrender he goods on 31 August 2010. Applicant then capitulated and in a letter dated 11 August 2010 agreed to collect the goods on 31 August 2010 but suggested that the applicant would visit the second respondent shop on Friday 13 August 2010 for purposes of stock take and accounting pending the collection of the goods on 31 August 2010. However the second respondent was not agreeable to this and wrote in a letter dated 12 August 2010 but only delivered to the applicant on 16 August 2010 at 1334hrs that the second respondent's counsel was not available on Friday 13 August and will only contact the applicant after Monday 16 August to respond to the applicant's request for a stock take. Needless to say the applicant proceeded to the second respondent's shop on Friday 13 August 2010 (applicant had not received the second respondent's letter objecting to this). What then transpired on 13 August 2010 is captured in para 19 of the applicant's founding affidavit. In brief the applicant was denied access to the shop, no cash was handed over to the applicant and the applicant realised that some of the goods had been removed from the display and placed in a store room, tables were dumped carelessly outside and some goods valued at about US $100 000-00 were removed from the shop and the second respondent was unwilling to disclose the whereabouts of those goods.

In my view the sequence of events clearly shows that as at 13 August 2010 both parties were agreeable that goods would be collected on 31 August 2010. The purpose of the proposed visit on 13 August 2010 was not to collect the goods but to carry out a stock take pending the surrender of the goods on 31 August 2010. What then prompted this application is captured in the applicant's founding affidavit para 20:-

> "On 13 August 2010 it became clear to the applicant that he stands to suffer irreparable loss because his property was no longer accessible to him and he has no knowledge of its whereabouts and no longer trusted the promise to handover property on 31 August 2010".

It is pertinent to note that 13 August 2010 was a Friday hence after only one working day and on 17 August 2010 the applicant filed this application. In my view one cannot seriously argue that a delay of one day constitutes inordinate delay and therefore would qualify this matter as not being urgent. To that extent therefore the applicant acted diligently and timeously in a bid to address the problem which arose on 13 August 2010. In that context therefore one may be inclined to rule that the matter is indeed urgent.

The problem in making such a finding arises from the relief sought by the applicant. The question to be asked first is what was the dispute between the parties on 13 August 2010 which prompted this application? It was certainly not in relation to ownership of the goods. The ownership of the property was never in issue at any stage. This then begs the question why in the final order the applicant seeks a declaration that this property in Annexture 'B' belongs to the applicant. That is a non issue. It is disingenuous for Mr *Ndudzo* to argue that the applicant merely seeks a declarator in the final order when in fact what is before this court is not an application for a declarator but a provisional order subject to confirmation on the return date.

The other aspect to note is that as at 13 August 2010 the surrender of the goods in Annexture 'B' to the applicant by the respondent was not an issue. Parties had agreed that this would be done on 31 August 2010. There could not therefore have been an urgency in the surrender of the goods on 13 August 2010 when parties had already agreed that this would happen on 31 August 2010. This would mean that in the context of the relief sought by the applicant, which is the surrender of the goods there is no any urgency at all. It would be self created urgency as parties had agreed to 31 August as the date to collect the goods. On this score alone, this court is of the view that the matter is not urgent.

In my view the dispute between the parties as at 13 August 2010 was not the ownership of the goods as prayed for in the final order. It was not the surrender of the goods as prayed for in the interim relief sought. The issue was about being allowed access to carry out a stock take in anticipation of the surrender of the goods on 31 August 2010. The urgency therefore was in relation to the issue of being denied access to the goods to carry out stock take and proper accounting. Unfortunately this is not the relief sought by the applicant. As per the interim relief sought the applicant prays for immediate surrender of the goods which goods the applicant had agreed to collect on 31 August 2010. The interim relief does not seek to address the issue of being allowed access to the shop for accounting and stock take purposes. Mr *Ndudzo* did not even seek to amend this defective provisional order despite the persistent concerns by the court even at the eleventh hour.

In conclusion I would also want to make the point that even if I was to find that this matter is urgent I am not inclined to grant the relief prayed for. The reason is that the provisional or interim relief prayed for if granted has the effect of a final order. In other words once the goods are returned to the applicant as per provisional order there would be no point even on the return

date to deal with the question of ownership of these goods, which issue has always been a non issue.

My finding is that there was urgency in this matter on the basis of the dispute which arose regarding access to the goods for purposes of stock take and accounting. However such urgency does not relate to the relief sought. The relief sought is misplaced and improperly drafted. This court cannot in the absence of a proper application, proceed to amend the relief sought moreso when such shortcomings were brought to the attention of the applicant's counsel.

Lastly Mr *Nhemwa* sought an award of costs on a higher scale on the basis that this application is ill conceived, unnecessary and replete with basic errors, moreso as there was no dispute between the parties. While I agree with Mr *Nhemwa's* observations in respect of other issues he raised I do not entirely share his overall sentiments.

At the commencement of the hearing of this matter the court pointed out that the parties could resolve the issue without need for a full fledged hearing of the matter. Mr *Nhemwa* was not amenable to this on account of costs. The conduct of the second respondent cannot be said to be without reproach. The second respondent was unwilling to unconditionally agree to cancellation of the agency relationship. The second respondent was unwilling to unconditionally surrender the goods and most importantly seemed unwilling to allow the applicant access to the goods, which goods the second respondent admits belongs to the applicant. In other words the second respondent was only willing to deal with the issues on the second respondent's terms, nothing less. Given those facts I find no basis to reward the second respondent's conduct with a generous award of costs as prayed for. It is only fair and just that given the nature and the outcome of this case each party bears its own costs.

I accordingly make the following order.

1. The application is dismissed.
2. Each party is to bear its own costs.

Mutamangira & Associates, applicant's legal practitioners
Nhemwa & Associates, respondent's legal practitioners