MIKE NDOGA CHIVHANGANYE
and
OLIVIA ZVAKWANA CHIVHANGANYE
versus
OACRIDGE PROPERTIES (PVT) LTD
and
THE HONOURABLE MAGISTRATE CHIBANDA (No)

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 31 August 2010

M. Hungwe, for the applicants
J. Koto, for the first respondent

MUTEMA J: On 31 August, 2010 I dismissed with costs an urgent chamber application on the ground that the matter was not urgent. The applicants have noted an appeal to the Supreme Court and have asked for the written reasons on which the dismissal was predicated. These are they.

The bare bones of the matter that could be gleaned from the first respondent's opposing papers are that the applicants were the registered owners of 10 Gayton Avenue, Sunridge, Harare. On 24 October, 2009, following the sale of the house for US$21 000.00 the applicants transferred title to first respondent in terms of deed of transfer number 4960/2009. (annexure SCM2).

On 1 November, 2009 the applicants, as tenants, concluded an agreement of lease of the property, to endure until 31 March, 2010. (annexure SCM4). By e-mail dated 22 February, 2010, first applicant confirmed conclusion of the sale of the house to a Mr Chikomwe, a director with first respondent, asking him to give the residue of the purchase price (after deducting the loan applicants had taken from first respondent and other expenses) to the second applicant. (annexure SCM5).

From 22 February, 2010 applicants were aware that they were to vacate the premises by 31 March 2010 as per the lease agreement. This is revealed by first applicant's response to the notice to vacate dated 10 March 2010 to Khanda and Company Legal Practitioners who then were acting for first respondent (annexure SCM3). The applicants did not vacate the premises in spite of undertaking to do so.

On 19 August, 2010 the Magistrates' Court granted an order against the applicants to vacate the premises within 48 hours. The 48 hours expired on 23 August, 2010. It was only on 26 August, 2010 that the applicants filed the urgent chamber application to try to

interdict the respondents from executing the eviction order arguing that they had filed an application for review against the Magistrates' Court ruling.

In *Kuvarega v Registrar General & Anor* 1998 (I) ZLR 188(HC) at p193, CHATIKOBO J sounded this salutary warning in respect of urgent chamber applications:

> "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. In the present case, the applicant was advised by the first respondent on 13 February 1998 that, people would not be barred from putting on the T-Shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. 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 arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay…….. Those who are diligent will take heed. Forewarned is forearmed." (my emphasis).

It goes without quarrel that this warning was not heeded by the applicants in the instant case. In his certificate of urgency, Simon Simango proferred two grounds as the basis of the alleged urgency viz:

> "1. The eviction is based on an agreement of sale which was fraudulently obtained. The second applicant was caused to sign a batch of papers most of which were blank papers, not knowing that they were an agreement of sale of their matrimonial house.
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> 2. It is undoubted that the Court *a quo* had no Jurisdiction …… The Honourable Court is obliged to stay the execution of a court order which was unprocedurally obtained, hence the need to treat this matter as urgent matter. The applicants might be evicted anytime before the application for review is heard.
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> 3. Fore these reasons, I certify that this is urgent."

This was a slipshod and slapdash way of drafting a certificate of urgency. The grounds raised are not germane to the type of urgency contemplated by the rules at all. The alleged fraudulent sale occurred in October, 2009 and transfer was thereafter effected. The applicants did not do anything to protect their interest then, only to now approach the court, when staring an eviction order in the face, alleging that the matter is urgent. Certainly absence of jurisdiction on the part of the court *a quo* cannot ground urgency as contemplated by the rules! In fact the eviction is not predicated upon the alleged fraudulent sale but on the lease agreement the applicants entered into with their

eyes open. They do not allege fraud regarding this lease. They were well aware of its expiry date. They were given due notice to vacate way back in February, 2010. They deliberately or carelessly abstained from action until the day of reckoning. No explanation either in the certificate of urgency or in the supporting affidavit was given for the non-timeous action.

The supporting affidavit does not at all support the first ground which appears in the certificate of urgency. Also, a baffling point is that whilst alleging absence of jurisdiction by the Magistrates Court, the applicants in their application for review in case 5780/2010 seek relief which includes remitting the matter to the same court before a different magistrate. Also, the 48 hours to vacate the premises expired on 23 August, 2010. From 19 August, 2010 the applicants sat on their laurels only to be galvanized into action on 26 August 2010 after first respondent's representative had egged them to vacate the premises in view of the eviction order without much drama. The applicants, it is quite apparent, are wont to employing delaying tactics and now wished to hide behind the finger of contrived urgency which they have dismally failed to establish. They were also economic with the truth – never disclosing that from November 2009 up to till now they never paid a cent in rentals thereby breaching the terms of the lease agreement, or that the second applicant was in fact paid US$5 000 by first respondent as the residue of the alleged fraudulent sale.

It was in view of the foregoing reasons that I dismissed the purported urgent chamber application.

Messrs Hungwe & Partners, applicants' legal practitioners
Messrs Koto & Company, first respondent's legal practitioners