

OLIVER CHIDAWU  
and  
BROADWAY INVESTMENTS (PRIVATE) LIMITED  
and  
DANOCT INVESTMENTS (PTY) LIMITED  
and  
DANNOV INVESTMENTS (PTY) LIMITED  
versus  
JAYESH SHAH  
and  
TN ASSET MANAGEMENT (PRIVATE) LIMITED  
and  
ISB SECURITIES (PRIVATE) LIMITED  
and  
ZIMBABWE STOCK EXCHANGE  
and  
CORPSERVE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
UCHENA J  
HARARE, 15 and 18 November 2011

**Urgent Application**

*H Zhou*, for the applicants  
*L Uriri*, for 1<sup>st</sup> respondent  
*Mrs B T Mutetwa*, for 2<sup>nd</sup> and 3<sup>rd</sup> respondents  
*Mr A B Chinake* for 4<sup>th</sup> respondent

UCHENA J: The first applicant borrowed money from the first respondent, to whom he surrendered Pelhams shares belonging to the second to the fourth applicants as security for the loan. He gave out the shares in a negotiable form. The applicants had signed share transfer forms, making it possible for the first respondent to transfer them to himself or a third party.

The second to the fourth applicants are duly registered companies in which the first applicant has interests and are holders of the shares in dispute. They are respectively holders of 171 037 346, 100 000 000 and 83 666 586 Pelhams shares.

A dispute later arose between the applicants and the first respondent over the loan, leading to the first respondent threatening to sale the shares. He threatened to sale them on two occasions. On each occasion the applicants threatened to institute litigation to stop the threatened sale but did not do so. The first respondent eventually sold the shares to the second respondent.

The third respondent is the broker who facilitated the sale of the shares between the first respondent and the second respondent.

The fourth respondent is the Zimbabwe Stock Exchange on whose bourse the shares in dispute were sold and it is the fourth respondent who can reverse the sale if the applicant's application succeeds.

The fifth respondent is the share transfer secretaries for Pelhams limited.

The applicants seek an interim order restraining the fifth respondent or any other person from transferring the second to the fourth applicants' Pelhams shares on the instructions of the first and the second respondents.

The first to the fourth respondents opposed the application. Mr *Uriri* for the first respondent and Mrs *Mutetwa* for the second and third respondents raised preliminary issues on the validity of the applicant's certificate of urgency, and absence of urgency. They submitted that the certificate of urgency was not the product of the deponent's independent opinion based on her personal and honest opinion on the urgency of the application. They forcefully argued that Tecla Mapota who prepared the certificate of urgency simply copied most of the paragraphs in her certificate of urgency from the certificate of urgency which had been previously prepared by Sarudzai Njelele for the applicant's earlier application which was dismissed by MAKONI J. Mr *Chinake* for the fourth respondent agreed with them.

A certificate of urgency must be prepared by a legal practitioner after personally carefully assessing the urgency of the application. It should be based on his or her honour. It should not be an uninformed endorsement of another legal practitioner's previous opinion.

Mr *Uriri* in his submissions closely analysed Tecla Mapota's certificate of urgency against that previously prepared for the applicant's previous application by

Sarudzai Njelele. The similarities in most paragraphs were not disputed by Mr *Zhou* for the applicants. In some paragraphs there is no difference between Mapota and Njelele's certificates. There are identical paragraphs tending to show that Mapota simply copied them from Njelele's certificate. Mr *Uriri* demonstrated that in some paragraphs the wording sentences and punctuations are identical.

Mr *Zhou* for the applicant's response was that this was due to there being a standard way of doing things among legal practitioners. Mr *Uriri* however argued that it is demonstrably clear that Mapota did not apply her mind to the facts of the case before she certified that the application was urgent. The deficiencies are extensively dealt with from pp 2 to 5 of the second respondent's opposing affidavit. In para 3.1 (a) of the second respondent's opposing affidavit it is pointed out that the loan should have been repaid by 10 March 2011, after which the shares which had been tendered together with signed share transfer forms in negotiable form could have been transferred to the first respondent or a third party. This means the shares had been exposed to disposal by the first respondent from that date, yet no action was taken to stop the possible sale of the shares till 20 October 2011. It was pointed out that Mapota did not deal with or explain that delay in her certificate of urgency proving that she did not apply her mind to the facts of this application before certifying the application as meriting the urgent attention of this court. I accept that this should have been explained and that failure to do so shows a failure by Mapota to apply her mind to the facts of this application.

In para 3.1 (b) and (c) the second respondent questions the applicant's failure to institute litigation when the two notices of sale of the shares were given by the first respondent. Again Miss Mapota did not deal with that issue in her certificate of urgency again demonstrating her failure to deal with the facts of the application before certifying it as urgent.

In para(s) 3.1 (e) and (g) the second respondent questions why the applicants did not communicate with second respondent on realising that it was buying the shares. The second respondent was only engaged through these proceedings eighteen days after the applicants became aware of the sale of the shares to it. Again Mapota did not deal with this issue in her certificate of urgency. She should have explained why the applicants did

not engage the purchaser of the shares if they were treating this matter as one of urgency. She also did not explain the delay between the application which was dismissed by MAKONI J and this application, in spite of it being common cause that the applicant's attempt to amend that application on 25 October 2011, to deal with the issues now being dealt with in this application, was dismissed. This means from that date the applicants were aware of the need to make this application but did not do so until 8 November 2011. Mapota should if she was applying her mind to the urgency of this matter have explained this delay.

The above demonstrates Mapota's lack of attention to the facts of this case before certifying this application as one requiring the urgent attention of this court. The need to explain delays was dealt with by CHATIKOBO J in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (HC) at p 193 E to G where he said:

“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 any delay”

As already said Mapota did not apply her mind to the facts of this case before certifying it as urgent. That affects the validity of the certificate of urgency. A certificate of urgency can only be valid and of assistance to the court if it's the legal practitioner's honest opinion of the urgency of the case derived from an analysis of the facts of the case.

In the case of *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 at 302E to 303 B GILESPIE J commenting on this issue said:

“Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in

which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required.

It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency”.

In this case it is clear that the legal practitioner did not apply her mind to the facts of the case as demonstrated by her not dealing with issues which could have confirmed the urgency or lack of it in this case. This is further demonstrated by the apparent reliance on Njelele’s certificate, which she seems to have copied without seriously applying her own mind to the facts of this case and its having progressed further after the dismissal of the applicant’s application, for which Njelele had given her certificate.

An urgent chamber application can only be properly before the court or be heard on an urgent basis if the applicant is legally represented if a legal practitioner files a certificate certifying its urgency. If the certificate filed is not the product of the legal practitioner who purports to have issued its’ mind and is patently inadequate, to the extent of its not being a valid certificate the case cannot be heard on an urgent basis, and will in fact be improperly before the court. It will be similar to a case where a legally represented applicant comes to court without a legal practitioner’s certificate of urgency. Such an application would be improperly before the court, and must be dismissed.

Rule 244 of the High Court rules provides for the certificate of urgency as follows;

“Where a chamber application is accompanied by a certificate from a legal practitioner in terms of para (b) of subr (2) of r 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.”

In terms of r 244 it is only when such an application is accompanied by a “certificate in terms of paragraph (b) of subr (2) of r 242 to the effect that the matter is urgent, giving reasons for its urgency”, that “the registrar shall immediately submit it to a judge, who shall consider the papers forthwith”.

In the absence of a certificate of urgency the registrar is not obliged to submit to a judge an application in which the applicant is legally represented. A judge is also not expected to consider an application where the applicant is legally represented, if the application is not accompanied by a certificate of urgency or a valid certificate of urgency. A judge can in considering the validity of a certificate of urgency consider the reasons given in the certificate of urgency to determine whether or not the legal practitioner has applied his or her mind in preparing the certificate.

Having found that Mapota’s certificate of urgency is a product of copying and pasting and is not one in which she applied her mind, I cannot act on it. The applicant’s application is therefore dismissed with costs.

*Honey & Blanckenberg*, applicant’s legal practitioners  
*Artherstone & Cook*, first respondent’s legal practitioners  
*Mutetwa & Nyambirai*, 2<sup>nd</sup> and 3<sup>rd</sup> respondent’s legal practitioners  
*Kantour & Immerman*, 4<sup>th</sup> respondent’s legal practitioners