DR VIVEK SOLANKI
and
AUTOBAND INVESTMENTS (PRIVATE) LIMITED
and
STREAMSLEIGH INVESTMENTS
versus
PETER JOHN ANNESLEY

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 2 & 12 December 2016 & 17 May 2017

Urgent Chamber Application

L Uriri, for the applicants
W. T Nyamakupa, for the respondent

PHIRI J: This is an urgent chamber application in which the applicants originally sought an Interim Order couched in the following terms:

> "Pending determination of this matter, the applicants is granted the following relief:
>
> 1. That the respondent or anyone claiming rights through him be interdicted from leasing Harare Trauma Centre situate at No. 15 Lanark Road Belgravia, Harare otherwise known as Harare Trauma situate at No. 15 Lanark Road, Belgravia.
>
> 2. That the respondent or anyone claiming rights through him be interdicted from using the premises situate at No. 15 Lanark Road, Belgravia, Harare otherwise known as the Trauma Centre."

The applicants also sought terms of the Final Order couched in the following terms:

> "That the first respondent and anyone claiming rights through him are called upon to show cause why a final order should not be made in the following terms:
>
> (a) That the respondent and anyone claiming rights through him be interdicted from using Harare Trauma Centre situate at No. 15 Lanark Road, Belgravia Harare.
>
> (b) That the respondent refunds all the money that he has received from the tenants at No. 15 Lanark Road, Belgravia to Shawn Leigh Investments (Pvt) Ltd.
>
> (c) That the respondent pays costs of suit on an attorney and client scale."

At the hearing of this application it was contended for and on behalf of the applicants

that the applicants were in effect seeking an ANTI DISSIPATION INTERDICT as against the respondent.

This court makes the preliminary observation that there is only one respondent in this case, PETER JOHN ANNESLEY and accordingly reference to "the first respondent" in the terms of the FINAL ORDER sought is a misnomer.

Secondly in the Heads of Argument filed on behalf of the applicants by Mr *Uriri*, who is a fairly Senior Counsel, at p 23 of the heads the last sentence thereof reads:

> "The application must be dismissed with costs at the legal practitioner and client scale."

It is ironic that in the preceding sentence in that paragraph the applicant's counsel had originally stated that "It is respectfully urged that the applicant has not made out a case for the grant of the anti-dissipation interdict sought in the relief as amended."

Counsel applied to amend that sentence but did not seek to amend the aforesaid last sentence at p 23 as aforesaid. This court does not lightly take such errors particularly coming from Senior Counsel.

At the outset it is this court's finding that the present application should be dismissed with costs on a legal practitioner and client scale as it holds that this matter is not urgent.

The following will be this court's reasons for arriving at that conclusion.

All parties to this application have correctly articulated the principles which this court must take into account in deciding the question of urgency.

The test as to what constitutes urgency was articulated in the case of *Kuvarega* v *Registrar General* 1998 (1) ZLR 188 as follows:

> "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 deadline 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 delay …" (as per CHATIKOBO J, as he then was at p 188 G-H).

This court also accepts submissions made on behalf of the respondent that for a matter to be treated as urgent the applicant must establish imminent danger, to existing rights and possibility of irreparable harm. See the cited case of *Triple C P165 & Anor* v *Commissioner General* ZRA 2007 27 where the Honourable GOWORA J (as she then was) remarked as follows:

> "Naturally every litigant appearing before these courts wishes to have their matter heard on an urgent basis because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts (in order to) ensure delivery of justice,

> would endeavour to hear the matter as soon as it is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render *brutum fumen*"

This court also holds that it is accepted law, as per Rule 244 of the High Court Rules 1971, that an application such as the present one ought to be certified by a legal practitioner to the effect that the matter is urgent. In several cases this court has stressed the need for legal practitioners who certify a matter as urgent to genuinely believe the matter to be urgent.

In the case of *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301 (per GILLEPSIE J) the court stated the following in relation to certificate of urgency:

> "It is therefore an abuse for a lawyer to put to his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. More over 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 he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in his certificate of urgency."

In the present application it was pointed out that the striking feature of the founding papers is the absence of:

> "specific dates, explanations for none-timeous actions and evidence supporting allegations that boarder on imputing criminal conduct on the respondent. Nowhere in the papers does the deponent to the founding affidavit inform the court the exact date he found out about the unlawful activities which he imputes on the respondent. He claims that the respondent is collecting rentals from tenants at 15 Lanark Road, Belgravia and converting the same to his own use. The claim is also made that the respondent is dissipating assets at the hospital but no cited of evidence is produced to support that for reaching allegation.
>
> More importantly the deponent does not disclose the truth regarding when he discovered all these supposed illegal activities. Nowhere does the deponent also take the court into his confidence regarding his own standing to seek the relief sought."

It was further submitted on behalf of the respondent, that;

> "In the letter dated 1 November, 2016, the legal practitioners for the applicants made the threat that they would approach this court immediately after the 10th November, 2016. Nothing happened. If the legal practitioner who certified the matter as urgent had applied his mind, he would have noted the absence of an explanation for the delay after that period."

The respondent's legal counsel further raised the point that;

> "In the letter dated 16th November 2016, the threat was made that this court would be approached if the applicants did not hear from the respondent's legal practitioners by the 18th November, 2016."

In the founding affidavit no explanation is given for the delay. The certificate of urgency does not even acknowledge this fact and consequently one can conclude that the legal practitioner who certified the matter as urgent never applied his mind to the facts.

This court also takes judicial notice of two critical issues which were raised when this matter was argued.

FIRSTLY

Reference was made to the fact that there were disputes already pending before, this court, which were associated with this matter. For instance disputes in case number 11800/12 and 2088/15.

This court painstakingly considered papers filed of record in those matters.

In the application in case number 2088/15 in the matter between Autoband Investments (Pvt) Limited (second applicant in this case) and African Medical Investments PLC an application was made for the "Return of hospital equipment and movable assets."

The first applicant in this case, is the one who deposed to the founding affidavit in case No HC 2088/15 and, in it, a good 25 pages of hospital movable assets were being claimed.

This was property left at 15 Lanark Road, Belgravia when the applicant in that matter was evicted by the Deputy Sheriff in June 2014.

The deponent to that Founding Affidavit, Dr Vivek Solanki, in his capacity as the Chief Executive Officer and Managing Director of the applicant thereto averred that he did not pursue the issue of the recovery of the moveable property as he hoped that the Constitutional matter associated with this case In case No. CZ 60/14 would be heard within a few months.

He also stated, in para 6 of his founding affidavit that;

> "Applicant was prepared to have the movable property kept at 15 Lanark Road, Belgravia Harare, the Trauma Centre….. Some of the hospital equipment is very sensitive and needs specialised technicians to dismantle it"

This court believes that the need to act surely should have arisen in June 2014 when the Deputy Sheriff took action in June, 2014.

The applicants in Case No. 2088/15 only filed their application in March, 2015 and subsequently the present application in December, 2016.

This court is accordingly not convinced that the need to Act only arose in November, 2016. This court also holds that there were material non disclosures, by the applicants, as regards the aforementioned cases that are still pending before this court. This court does not condone such actions on the part of the applicants.

In the case of *Glaspeak Investments* v *Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551 at p 555 C – D it was held;

> "The courts, in my view, discourage urgent applications whether *exparte* or not, which are characterized by material non-disclosure *mala fide* or dishonesty. Depending on circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants"

This court holds that he present application also fails to meet the test of urgency on that basis.

SECONDLY

This court was also referred to the Supreme Court case of *Steamleigh Investments (Private) Limited* v *Autoband Investments Private Limited* Case No. SC 43/14.

Incidentally Mr *Uriri* was the respondent's counsel in respect of that matter and, in the present case appears for and on behalf of the applicants. In the Supreme Court the eviction order granted by the magistrates court Harare in the matter between *Autoband Investments (Private) Limited t/a Trauma Centre* v *African Medical Investments* in Case No. HC16435/11 was declared to be of no force and effect and it was also ordered that he applicant (Streamleigh Investments (Private) Limited be restored to possession and occupation of premises known as Stand 2924 Salisbury, Township of Salisbury Township Lands situated at Number 15 Lanark Road, Belgravia, Harare.

This court also takes Judicial Notice of the fact that Leave to Execute pending appeal was granted by Justice GARWE J after having concluded that there were no prospects of success on appeal in respect of the appeal lodged against the Supreme Court decision.

This court is alarmed that despite the aforesaid finding of, the Supreme Court and GARWE J the applicants (and their counsel of record) lodged the present urgent application and agrees with the respondent's counsel that the present application is a disguised eviction, and, an attempt at reversing and undermining the Supreme Court's Judgment in case No. SC 30/14. The present application ought to be dismissed on that basis alone.

There also has been reference to an agreement in terms of which the applicants refer to a 'term sheet' in which the first applicant avers that he would be given control of the trust which is the majority shareholder in *Streamleigh Investments (Private) Limited.*

This court holds and agrees that here is no legal interest "real or imagined" which the applicants can purport to seek to protect.

Clause 5 of the afore said term sheet states;

> "This term sheet is subject to contract and with the exception of s 8 (costs) s 9 (Confidentiality) and s 10 (Governing law and Jurisdiction) below, is not nor is it intended to be legally binding and creates no obligation on any part"

This court holds that he applicants are not entitled to approach the court on the basis of rights which they are yet to acquire……. and consequently there cannot be talk of any rights with the result that no injury can be alleged to be in existence."

This court also accepts and holds that here is no third applicant before this court. This is on the basis of the finding made at p 4 of the Supreme Court Judgment in case no. SC 30/14 where at the Supreme Court settled the matter as to who constituted Streamleigh Investments (private) limited.

This court also accepts and holds that the respondent is not in personal occupation and possession of the Hospital Premises whose possession was given to Streamleigh Investments (Private) Limited in terms of the Supreme Court judgments aforesaid.

It is this court's considered view that besides the issue of urgency there is also the inescapable conclusion that given the History of the Broad dispute relating to all matters associated with this application, both previous and pending, there is, and, was, a potential dispute of fact associated with this application.

This court also holds that having regard to the allegations made in the founding affidavit and together with the allegations made in the opposing affidavit and submissions made by counsel the balance of convenience is in favour of the respondent and that there can be no doubt that the interim relief being sought by the applicants should not be granted.

This court makes reference to the case of *Reckitt & Colman SA (Pvt) Ltd* v *SC Johnson & Son (SA) (Pvt) Ltd* 1995 (1) SA 725 (T) where it was stated at 730B:

> "When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues the courts approach in determining whether the applicant's right is *prima facie* established though open to some doubt, is to take the facts set out by the applicant together with the facts set out the respondent which the applicant cannot dispute, and to consider whether, having regard for the inherent probabilities the applicant should (not could) on those facts obtain final relief at the trial in the main action.

> The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."

Further authority is found in the case of *Ferreira* v *Levin NO and Others, Vryhoek and Others* v *Powell N.O and Others* 1995 (2) SA 813 (W) 817 G in which SHREICHER J held;

> "In the case of an anti-dissipation interdict the applicant has to show *prima facie* that the respondent would be likely to hide or secret assets, possibly by moving them out of the jurisdiction with a view to defending the applicant's claim. *In casu* the applicant has not made out a case to support this kind of interdict and his counsel did not argue the matter on that basis."

This court accepts that argument that the applicants have no claim against the respondent in his personal capacity. Any claim by the applicants would have to be mounted against Stream Leigh Investments (Private) Limited assuming that the legal basis for such claim existed and it had merit.

This court also makes comment on the obvious similarity between the interim relief and the final relief sought.

The courts have held that the litigant should never gain what is in form final relief by way of an interim relief order. it is also quite settled that the relief sought in the interim must be different in effect and form from the relief sought on the return day.

Given the manner in which the relief is framed in this matter, there cannot be nay motivation on the applicants to seek confirmation.

In the case of *Kuvarega* v *Registrar Geeral and Anor* (*supra*); it was stated:

> "The practice of seeking interim relief which is exactly the same as substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the more showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect; it means that the applicant is granted he main relief on the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here the applicant will have no interest in the outcome of the case on the return date (at page 193 A-C)"

The authorities use the word "injury" as meaning an act of interference with, or an invasion of the petitioner's right and resultant prejudice. The injury must be a continuing one. The court will not grant an interdict restraining an act already committed. In this case there is no injury as the rights are simply non-existent.

> "A final interdict is a drastic remedy and is in the court's discretion. The court will not, in general grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. An application for a permanent interdict must allege and establish on a balance of probability that he has no alternative remedy."

The deponent to the founding affidavit avoided the issue and it should therefore be taken that the requirements are not met.

In conclusion I accept the argument raised on behalf of the respondent, that it is clear that the present application is a ruse intended to obtain, via the back door, a reversal of the Supreme Court judgment which resulted in the eviction of the first and second applicants in 2014.

Indeed, it is unfortunate that the applicants have the assistance of legal practitioners and officers of this court in perpetrating such conduct. This is aggravated by the fact that this application is not the first time the applicants have sought to use this court in order to subvert the Supreme Court.

Indeed this court will not allow wool to be pulled over its eyes and disapproves present application for the abuse of court process that it constitutes.

Accordingly this court holds that this present application is not urgent and orders that the first and second applicants bear the costs on a legal practitioner and client scale.

Venturas & Samukange, applicants' legal practitioners
Mtetwa & Nyambirai, respondent's legal practitioners