REWARD KANGAI
versus
NETONE CELLULAR PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 26 April 2017, 24 May 2017

Urgent Chamber Application

T. Biti, for the applicant
S. Sinyoro, for the respondent

CHIGUMBA J. This is an urgent chamber application in which the relief sought is that the respondent be interdicted from filling the applicant's position of Chief Executive Officer pending the determination of another court application filed under case number HC11003-16 between the same parties. The final order sought was amended at the hearing of the matter to be one for costs of suit. The applicant is a male adult who describes himself as having been in the respondent's employ for 'many decades' in terms of a contract of employment entered into between himself and the respondent, a company incorporated in terms of s7 of the Companies Act [*Chapter 24:03*] as read with s106 of the Post and Telecommunications Act [*Chapter 12:05*]. He was employed as Managing Director of the respondent on the 19th of July 2013.

The applicant made the following averments in his founding affidavit;- that his most recent position in the employ of the respondent was that of Chief Executive Officer (CEO) until February or March 2016 when reports suddenly appeared in the media that respondent's senior management had committed various acts of misconduct and abused their offices for financial gain. On 14 March 2016 respondent commenced highly publicized proceedings which amounted to character assassination of the applicant in the performance of his fiduciary duties. He was sent on forced leave which was subsequently extended for the purpose of investigating these

allegations. An audit was conducted into the affairs of the respondent and the resultant report alleged that the applicant had abused his office to the respondent's prejudice. On 19 September 2016 applicant was asked to respond to the allegations in the audit report. Before he could do so, he was suspended from work without pay and benefits on 3 October 2016 by the respondent's board. Misconduct charges were brought against him, after respondent had given an assurance, through its legal practitioners of record, in a letter dated 5 October 2016, that the letter of the law would be followed.

The applicant filed an application for a declaratory order under case number HC10400-16, seeking an order which declared that the respondent's board did not have the power or authority to suspend him without pay, that his suspension was consequently unlawful, that respondent was barred from instituting disciplinary proceedings against him because of their bias against him, or, in the alternative, that the parties agree on an independent Arbitrator to determine the charges to be brought against the applicant, whose decision would be final. The applicant received two letters concurrently which purported to withdraw the disciplinary proceedings, and to terminate his contract of employment on three months' notice. In the letter dated 12 October 2016, the charges preferred against him on 3 October were withdrawn, his suspension was lifted, and he was advised that he remained on forced leave up to 31 October 2016. The respondent reserved its rights to pursue lawful remedies against him. In the second letter of the same date, the applicant was notified that his contract of employment had been terminated in terms of s 12 (4) (a) and 12 (4a) (c) of the Labor Act [*Chapter 28:01*] as amended by the Labor Amendment Act number 5-2015.

The second letter stipulated that the notice period was to run from 1 November 2016 to 31 January 2017. The applicant was advised that he would be paid cash *in lieu* of notice, making it unnecessary for him to report to work. He was to be paid compensation for loss of office at two weeks' salary for every year served, in accordance with the provisions of s4 of the Labour Amendment Act number 5-2015. The applicant registered his objection to the contents of these two letters in his own letter from his legal practitioners of record dated 14 October 2016. In that letter, it was opined that the purported termination of employment was a nullity, and that proceedings to set it aside would be instituted unless it was withdrawn. The basis of this opinion was that the respondent had approbated and reprobated at the same time which was considered

irregular and unfair to the applicant for the reason that, having chosen the fault route of terminating employment, and maligned the applicant's good name and reputation, the respondent was no longer at liberty to now rely on the easier route of notice. The respondent was advised that it was duty bound to allow the applicant an opportunity to clear his name, more particularly in light of the fact that the respondent itself had reserved its right to pursue any other remedies at its disposal against the applicant, including criminal sanction.

The application for declaratory relief is pending before this court and has reached advanced stages of *litis contestatio.* It is common cause that the respondent has advertised for a new CEO. The applicant is aggrieved at this, because of the court application which is pending. The applicant contends that his need to act arose on the date that the advertisement for his position appeared on the respondent's website. The applicant avers that, in seeking to replace him, the respondent is cursorily dismissing his right to be heard, his right to be cleared using the fault route as opposed to merely being dismissed using termination by notice. He avers further, that he has a *prima facie* right to interdictory relief for the reason that he is still the respondent's incumbent CEO as the purported termination of his contract of employment is a nullity. He has a reasonable fear that if his position is filled before the pending application is determined he will suffer the irreparable harm that he will never have an opportunity to clear his name by having the allegations against him ventilated and possibly invalidated. The applicant, avers that he has no satisfactory legal alternative remedy at his disposal. In his opinion the balance of convenience favors acceding to the interim relief which he is seeking, in the interests of preserving his right to be heard.

On 26 April 2017, in accordance with the agreement between the parties during a case management conference, the respondent filed a notice of opposition, which was premised on an opposing affidavit deposed to by Mr. Brian Mutandiro. The position taken at the outset is that this matter is neither urgent nor merited. It was averred that;- the applicant was abusing court process on a fraudulent *mala fide* premise underpinned by non-disclosure of material facts. The first preliminary point raised was that the applicant had failed to comply with mandatory rules of this court which require that an urgent chamber application be in Form 29 as opposed to Form 29B, because it was imperative to provide for service of such an application on an interested

party. The second preliminary point raised is that this matter does not meet the requirements of urgency.

The respondent attacked the certificate of urgency for omitting an essential averment, that the application had been placed before the certifying legal practitioner Mr Sheshe, for his own independent assessment of the urgency of the matter. With regards to the merit of the matter it was averred on behalf of the respondent that applicant had failed to establish any risk or irreparable harm in the founding affidavit. The respondent denied that it had 'victimised' the applicant, and accused the applicant of instituting proceedings under case HC11003-16 in a bid to forestall the termination of the contract of employment of 12 October 2016 by having it declared a nullity. It was averred that the applicant's contract of employment was lawfully terminated in terms of the Constitution and in terms of Labour Law. It is common cause that the misconduct charges against the applicant were withdrawn after he had provided detailed objections to them. The respondent avers that for this reason, it is incorrect to say that the applicant was denied the right to be heard. The respondent avers further, that it is an employer's prerogative to discipline its employees and to reconsider any charges preferred against such employees, once the charges have been responded to.

Finally, it was averred on behalf of the respondent that, the applicant's contract of employment was due to be terminated by the effluxion of time on 30 June 2017. As a result on 23 March 2017, the offer of a contract payout sum of USD$247 984-33 was communicated to the applicant's legal practitioners. The applicant was advised that this sum would be paid out on condition that he withdraws the two pending court applications. On 4 April 2017, the applicant advised that he intended to pursue his claim for unlawful termination of his contract of employment despite the offer of a contract payout. To date the applicant has not acknowledged receipt of the contract payout. It is for this reason that the respondent contends that the matter is not urgent. The respondent disputes that the applicant has any need to be exonerated since the fault charges against were resolved by being withdrawn. In so far as reinstatement goes, the respondent avers that it has no desire or legal obligation to reinstate the applicant, and that this aspect is not urgent as the applicant has another remedy, that of seeking damages *in lieu* of reinstatement.

The certificate of urgency was authored by Mr Douglas Sheshe, his views for certifying the matter urgent were that;- the allegations of applicant's self-aggrandizement were widely publicized, as well as the fact that he had been sent on forced leave on 14 March 2016, the audit report appeared to indict applicant for abuse of public office, the misconduct charges against the applicant included allegations of corruption, conflict of interest, dishonesty and fraud, it was important to allow the merits of the court application for a declaratory under HC10400-16 to be ventilated, applicant was prejudiced by the withdrawal of the fault based charges because this denied him an opportunity to clear his name.

We must first determine whether or not this matter is urgent, in other words, whether this is one of those special matters which deserves to have the normal and ordinary rules of this court suspended, the stipulated time periods to be waived, other litigants' interests to be temporarily overlooked, the Judge to 'drop' everything and to give the applicant audience because failure to do so would result in a 'palpable injustice' in these circumstances. Can it be said that if this applicant is not allowed to be heard ahead of other litigants who are already in the queue there will be an inexcusable failure to do justice timeously, such that, any subsequent attempt to do justice would be meaningless, or 'hollow'? Numerous cases, both in this court and the more superior courts, have established the test for urgency. No useful purpose would be served by regurgitating what has been firmly established, except that, out of abundance of caution, and in a bid to guide counsel, invariably the case law must be repeated, in the hope that this 'seemingly elusive' concept of urgency becomes clearer to litigants.

It is now settled that;-

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it". See *Dilwin Investments Private Limited t/a Formscaff* v *Jopa Engineering Company Ltd*[1].

It is also trite that;-

> "A party favored with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the

[1] HH 116-98

order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike". See *Mayor Logistics Private Limited* v *Zimbabwe Revenue Authority* [2], *Document Support Centre Private Limited* v *Mapuvire*[3].

In the case of *Triple C Pigs & Anor* v *Commissioner General Zimra*[4] , the court, in giving guidance on the exercise of its discretion in an urgent application, opined that it must;-

'….consider whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not 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 a *brutum fulmen"*.

It has been held further, that:

"Applications are frequently made for urgent relief. 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". See [5]
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It has also been held that:

"For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [6] And[7], [8]

[2] CCZ 7-2014
[3] 2006 (1) ZLR 232 (H) 243G; 244A-C
[4] HH7-07
[5] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189
[6] *Mathias Madzivanzira & 2 Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002
[7] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H)
[8] *Williams* v *Kroutz Investments Pvt Ltd & Ors* HB 25-06, *Lucas Mafu & Ors* v *Solusi University* HB 53-07

In my view, (which I have expressed before) in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.
(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
(c) There is *prima facie* evidence that the applicant treated the matter as urgent.
(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
(e) There is no satisfactory alternative remedy.

I find that the applicant met all the criteria set out above except the last, but not least one. The applicant himself told us that he has an alternative remedy, which he has already utilized. He has a pending application for a declaratory order which may be heard at any moment. In case this alternative remedy has been rendered unsuitable, or inadequate, by the subsequent advertisements for the filling of the applicant's post, it is our considered view that there are other remedies at the applicant's disposal. We do not accept that the withdrawal of the disciplinary proceedings may only be construed as a denial of his opportunity to clear his name. There are common law remedies at his disposal such as claims for damages for defamation. We do not accept it as trite, that if the respondent succeeds in replacing the applicant this will necessarily constitute irreparable harm or prejudice.

The applicant has the right to apply for his reinstatement in the appropriate forum of his choice. Or in the alternative, damages *in lieu* of reinstatement. The applicant has domestic remedies which he is at liberty to pursue, perhaps even as a matter of urgency. The applicant has not taken us into his confidence as to the current status of his contract of employment, whether indeed his terminal benefits were disbursed and received by him in full, whether he accepts that the respondent has a right to terminate his contract by the effluxion of time. For these reasons we find that the matter is not urgent. Costs shall remain in the cause.

Messrs Tendai Biti Law, applicant's legal practitioners
Messrs Sinyoro & Partners, respondent's legal practitioners