DAVID WHITEHEAD TEXTILES LIMITED
(herein represented by Knowledge Hofisi in his capacity as the final Judicial Manager)
versus
EDWIN CHIMANYE
and
JUSTICE GUSHA
and
THE MASTER OF THE HIGH COURT (N. O)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, June 11 and 14, 2019

Urgent Chamber Application

R M Fitches with *C Zinyengere,* for the applicant
T. Moyo, for 1st respondent
2nd respondent in person

CHITAKUNYE J. The applicant approached this court on a certificate of urgency seeking an order in the following terms;

TERMS OF FINAL ORDER SOUGHT

1. That the 1st and 2nd Respondents be and are hereby interdicted from issuing any Press statements on behalf of the Applicant and are ordered to abstain from use of the Applicant's logo in issuing their Press statements or for any other purpose without the Applicant's express consent.
2. Respondents shall pay costs of suit on an attorney and client scale

INTERIM RELIEF

1. Pending the return date, the 1st and 2nd respondents be and are hereby ordered to withdraw and retract their unlawful Press statement issued in the Herald Business Newspaper of the 6th of June 2019 by inserting a press statement in the Herald Business Newspaper of the same prominence as their unlawful press statement within four business days of the grant of this order.
2. Respondents shall pay costs of suit on an Attorney and client scale.

The circumstances leading to this application are that in the Herald Newspaper of 6th June 2019 there was inserted a press statement allegedly made by the 1st and 2nd respondents.

The first respondent is described as representative of shareholders whilst the second respondent is described as representing creditors.

The deponent to applicant's founding affidavit, in his capacity as final Judicial Manager, upon cite of the press statement felt it was improper for the 1st and 2nd respondents to have issued such a press statement on applicant's logo and virtually disparaging what he had been doing which act he viewed as a threat to the efforts he was making in securing an investor for applicant. He alleged that the press statement was misleading and mischievous as its contents were disparaging against the applicant, himself and his office. He also alleged that the use of applicant's logo by the respondents was unlawful and deceitful.

The first and second respondents opposed the application. The first respondent raised some points *in limine* which the second respondent chose to ride on as well.

The first point *in limine* was to the effect that the relief sought is incompetent and incapable of being granted as the applicant sought a relief that is final in nature whilst pretending that it is interim. The first respondent's counsel argued that the relief of retraction once granted is final and so it cannot be granted as an interim relief.

The second point *in limine* was to the effect that the matter was not urgent as the applicant has not alluded to any further press statements respondents are on the verge of issuing. The application, as it were, is premised on a press statement that has already been issued and, according to applicant, which has already caused harm. It is thus of no value to grant an order to interdict the issuance of a statement that has already been issued.

The next *point in limine* pertains to the locus standi of the deponent to the applicants founding affidavit.

This last point *in limine* arose from the manner in which the founding affidavit was couched in some instances. For instance in paragraph 20 he deposed that: -

> "Secondly and applicant must establish that it has an irreparable injury actually or reasonably apprehended. I have no doubt that the contents of the press statement in issue are clearly designed to discredit the efforts that I have undertaken as a statutory authority.
> "21. In particular the article carries the following deliberate stings:
> 21.1 That the judicial manager is acting *ultra vires* the Companies Act.
> 21.2 That the judicial manager showed favour in the selection of the new investor.
> 21.3 That the decision to accept the offer made by the new investor is insanely outrageous and unlawful as to induce shock.
> 21.4 That the judicial manager is corrupt and unethical."

Later he states that:

> "24. My standing, as a competent court official has been tainted and soiled by the use of the logo.
>
> 25. I am further advised that the third requirement is that I should demonstrate that there is no other remedy to my situation. This I verily state is the scenario. The relief for a final interdict where a third party is publicly misrepresenting facts through the unauthorised use of a logo which is under mu custody, is the sole remedy available to a litigant in my situation."

It was from such depositions that respondents contended that the cause of action seems to be on the defamation and casting of aspersions on the standing of the judicial manager, and not the applicant.

A careful examination of the applicant's founding affidavit lends credence to the points *in limine* raised.

On the nature of the relief being sought on a certificate of urgency, the deponent stated thus in paragraph 17:-

> "The instant application is for a final interdict. I am advised which advise I accept to be true and correct that in an application for a final interdict, certain requirements must be established."

After alluding to the fact that applicant has a clear right to the logo, applicant then proceeded to allude to the second requirement in paragraph 20 cited above which clearly refers to his own reputation and standing and not that of the applicant.

The applicant's counsel made effort at repulsing the points *in limine* but without much success. For instance on the fact that the interim relief sought is in fact final in nature, counsel conceded so. He however suggested that court can amend it to suit the case such that the logo is not used. It was however not clear as to how such an amendment would suit in with the final relief for the return date. This court has in a number of cases alluded to the difficulties of a litigant rushing to court on a certificate of urgency yet seeking a final relief. It is trite that an interim relief is granted before parties have been given opportunity to fully ventilate their cases. On the return day court may confirm or discharge the provisional order. In *Mike Velah and others* v *the Minister of Primary & Secondary Education and another* HH 124/18 at p 3, ZHOU J aptly said the following of a litigant who sought interim relief with the effect of the final order:

> "The first insurmountable hurdle for the applicants is the relief which they seek. The relief sought is final not just in its form and substance but in its effect. This court has in many judgments warned against the undesirability of seeking final relief through an urgent chamber application under the guise that it is interim relief. Quite apart from the procedural requirement that this kind of relief should be sought by way of review

> as an ordinary court application as required by order 33 r 256, if the relief was granted as sought its consequences would be irreversible should the provisional order be not confirmed. The interim relief that the applicants seek is that the decision to withhold the applicants' results be set aside, and for the applicants' results to be confirmed and released. Mr *Chamuka* understandably was unable to make any meaningful submission on how that kind of relief could be granted as interim relief. On that ground alone, the relief which the applicants seek is incompetent and this court cannot grant it other than with the consent of all the parties to the dispute. The application thus fails on that basis."

Earlier in *Williams* v *Katsande & Another* 2010(1) ZLR 266(H) at 275F-G where the interim relief sought had the effect of a final relief MAWADZE J stated thus:

> "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 *Kuvarega* v *Registrar- General & Another* 1998 (1) ZLR 188 at 193A-C CHATIKOBO J opined that:

> "The practice of seeking interim relief, which is exactly the same as the 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 mere 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 the main relief on proof merely of a prima facie case. This, to my mind, is undesirable especially whereas here, the applicant will have no interest in the outcome of the case on the return day."

In a bid to rescue the application applicant's suggested an amendment such that the interim relief deals with the aspect of press statement but the net effect of the suggested amendment, belated as it was, would still be the same as the final order as per the draft. This is an aspect that is equally undesirable.

Another aspect raised was that applicant seeks costs on the legal practitioner client scale in the interim relief. This is another anomaly applicant could not explain. Interim relief being what it is does not bring issues between the parties to finality. It essentially gives the parties a breathing space whilst they await the return date. It is in this regard that issues of costs are not usually awarded at this stage as tables can always turn against applicant on the return date. I did not get a satisfactory explanation from applicant's counsel. It would appear costs were being sought as applicant was in fact seeking a final order under the guise of an interim relief. This cannot be.

On the basis of the above clearly this application cannot succeed.

The second point *in limine* pertains to urgency. The respondents contended that there is a dearth of any averment as to the imminence of any event of any nature whatsoever. The applicant has not alleged that besides the press statement that was already made, there was imminent danger of further press statements being issued and which are likely to cause harm. In the circumstances applicant is seeking to interdict something that has already been done. In this regard applicant stated as follows in para 22 of the founding affidavit:

> "The harm that has been suffered is that the press statement was on the Applicants official Logo and yet carried misleading information which does not represent the Applicant's appreciation of the issues represented in the statement. The Applicant's official position on the subject of the press statement appeared in the press statement which I inserted in the Herald Business Newspaper of the 1st June 2019 which the Respondents now seek to discredit."

The above does not portray that respondents will insert another press statement on the applicant's logo.

It was upon applicant to lay a reasonable foundation to the effect that further harm was imminent.

In that bid in paragraphs 27 and 28 of the founding affidavit applicant stated thus:

> "If the interdict is not issued the Applicant stands to suffer irreparable harm and Respondents will likely continue to mislead members of the transacting public and misrepresent matters concerning the Applicant to the Applicant's ultimate detriment.
> In the circumstances, I pray for an interdict that the Respondents be interdicted from further use of the Applicant's Logo in their Press statements or any other publication they may desire to make. I further pray that the 1st and 2nd respondents be ordered to retract their unlawful press statement."

Whilst mention is made that respondents 'will likely continue' and that they 'may desire to make' further statements, no reasonable ground was laid for such fears or apprehension.

It is my view that, whilst the need to stop any further use of the logo may be justified, the applicant ought to have proffered facts showing the likelihood of such continuation, hence must be stopped on an urgent basis.

In *casu*, the applicant lamentably failed to do so.

On the question of locus standi, it is common cause that the Judicial Manager is the legal representative of the applicant and as such where interests of applicant are threatened, he is expected to act in defence of the applicant. In that vein it is important to distinguish the protection of his own personal interests and those of the applicant. As already alluded to above, it is the confusion between the alleged damage to the reputation and good standing of

the Judicial Manager as he felt defamed by the press statement and the alleged damage to applicant as an entity. The judicial manager ought to have separated issues to do with his own reputation as judicial manager from that of the Applicant as a legal entity.

Consequently, based on the above findings, especially that the relief sought is incompetent, the application cannot succeed. The application is hereby dismissed with costs.

Zinyengerere Rupapa, applicant's legal practitioners
Tamuka Moyo Attorneys, First Respondent's legal practitioners