(1) OLIVER MANDISHONA CHIDAWU (2) BROADWAY INVESTMENTS (PVT) LTD (3) DANOCT INVESTMENTS (PTY) LTD (4) DANNOV INVESTMENTS (PTY) LTD

v

(1 JAYESH SHA (2) TN ASSET MANAGEMENT (PVT) LTD (3) ISB SECURITIES (PVT) LTD (4) ZIMBABWE STOCK EXCHANGE (5) CONSERVE (PVT) LTD

SUPREME COURT OF ZIMBABWE
MALABA DCJ, GOWORA JA & OMERJEE AJA
HARARE, JUNE 19, 2012 & MARCH 18, 2013

M Magwaliba with *D Ochieng*, for the appellants

L Uriri, for the first respondent

T Mpofu, for the second and third respondents

T Tandi, for the forth respondent

No appearance for the fifth respondent

GOWORA JA: This is an appeal against the judgment of the High Court dismissing urgent application made by the appellants. The first appellant, (hereinafter referred to as) Chidawu, is the beneficial holder of all the shares in the rest of the appellants, (hereinafter referred to as the appellant companies). In turn, the appellant companies owned cumulatively in excess of 380 million shares in Pelhams Limited.

On 9 February 2011, Chidawu borrowed an amount of USD3 million from the first respondent, (hereinafter referred to as Shah). The terms and conditions attaching to the loan were recorded in two written documents signed by the parties on 9 and 10 February

2011 respectively. The second document, referred to by the parties as Annexure "B" provided in clause 2.1 that in the event of any inconsistencies in any of the provisions of the two documents, its provisions would prevail.

The material terms of the agreement were these, firstly, the loan would attract an interest rate of 18% per annum compounded monthly. The loan was repayable on or before 20 February 2011, subject to an extension to 20 March 2011 at the sole discretion of Shah. Secondly, as security for the loan, Chidawu was obliged to provide sureties in the form of Deeds of Surety executed by each of the appellant companies. The execution of a Deed of Surety was to be accompanied by the surrender of the share certificate each appellant company held with Pelhams Limited. Chidawu was also obliged to surrender the said share certificates in negotiable form to Shah or his nominees by 10 March 2011 in the event that repayment of the loan would not have been effected by that date. On 9 February 2011, Chidawu handed over the shares certificates and executed the necessary transfer documents.

Chidawu was unable to pay the loan by due date. Through his legal practitioners, Messrs *Atherstone & Cook*, Shah called up the loan and by letter dated 11 March 2011 threatened to liquidate the security in his possession. On 18 March 2011, Messrs *Honey & Blanckenberg* on behalf of Chidawu, responded to the threat as follows:

> "We act for the above named Oliver Chidawu who has instructed us to respond to your letter dated 11 March 2011.
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> Your client's threat to start liquidating the security tendered by our client without instituting legal proceedings is a clear case of *paratie executie*. Accordingly, unless we receive written undertaking from either yourselves or Mr Shah that he is not going to proceed with the intended sale of our client's security by Monday 21 March 2011, we are under instructions to lodge an urgent application with the courts for relief."

On 5 April 2011, Shah caused summons to be issued out of the High Court against all the appellants, claiming payment of the sum of USD2 700 000.00, interest at the rate of 18% per annum and costs of suit. The appellants entered appearance to defend and filed a joint plea in which they denied being indebted to Shah. There does not appear to have been any further communication between the parties until 13October 2011, when Messrs *Atherstone & Cook* addressed a letter to *Honey & Blanckenberg* in the following terms:

> "We refer to previous correspondence addressed to you in this matter. As you will recall, our client is holding 357 million Pelhams shares in negotiable form.
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> Your client owes an amount in excess of USD 2 550 000.00 exclusive of collection commission. We are happy to advise that our client has found a buyer of the aforesaid Pelhams shares. Accordingly, we advise that if your client fails to pay the balance outstanding within 48 hours of receipt of this letter Messrs Lynton Edwards Stockbrokers will be instructed by our client to sell the shares at a floor price of USD 0.00711. In the event that the proceeds of the sale are not sufficient to cover the debt, our client reserves the right to proceed against yours in the usual manner."

The response from *Honey & Blanckenberg* was to same effect as their previous letter of 18 March 2011. The letter threatened legal action if they did not receive written undertaking by 14 October 2011 to the effect that the proposed sale of the shares, would not be proceeded with. There was no written undertaking given and on 20 October 2011, the appellants filed an urgent chamber application to stop the sale. The sale was concluded on 25 October 2011 which was the scheduled date for the hearing of the chamber application. It is common cause that an application to amend the provisional order to incorporate the sale of the shares and interdict their transfer was dismissed by the learned judge before whom the application had been placed. She also found that the founding affidavit had not been commissioned. As a result she held that there was no application before her.

On 8 November 2011, the appellants made the urgent chamber application, which is the subject of the appeal. It was opposed by all the respondents, who raised a preliminary issue on the validity of the certificate of urgency filed with the application. It was contended by the respondents that there were obvious substantive similarities between the certificate of urgency signed by Miss *Njerere* which was attached to the application filed on 20 October under Case No. HC 10410/11, and the certificate by Miss *Mapota* accompanying the application under Case No. HC 11119/11. It was contended further that in view of the alleged similarities it was demonstrably clear that Miss *Mapota* did not apply her mind to the facts of the case when she certified that the matter was urgent. The learned judge found that Miss *Mapota's* certificate of urgency was a product of copying and pasting from the certificate filed by *Njerere.* He found that she had not applied her mind to the facts of the case. Accordingly the learned judge held that he could not act on the certificate of urgency as a valid document. He dismissed the application with costs.

The appellants filed the appeal on the following grounds:

1. That the learned judge *a quo* misdirected himself by rejecting as invalid the certificate of urgency duly signed by Tecla Mapota on the basis that some statements in it were similar to those in the certificate of urgency filed in Case No HC 10410/11.
2. The learned judge *a quo* misdirected himself by making a factual finding that Tecla Mapota did not apply her mind to the question of urgency on the basis of submissions made from the bar in the absence of any evidence to that effect.
3. The learned judge *a quo* misdirected himself, in any event, by determining that the fact of common passages or statements being found in the two certificates of urgency invalidated Tecla Mapota's certificate.

4. The learned judge *a quo* misdirected himself as to the legal effect of the similarities between some statements and passages in Tecla Mpota's certificate of urgency and that of Sarudzayi Njerere.
5. The learned judge *a quo* misdirected himself by ignoring that the similarities in some statements in the certificates of urgency were explicable by reference to the similarities in the facts and circumstances as set out in the affidavits in both HC 11119/2011 and HC 10410/2011.
6. The learned judge *a quo* misdirected himself in coming to the conclusion that there was an unexplained delay starting from March 2011, when the facts clearly showed that it was not necessary to institute proceedings then.
7. The learned judge *a quo* misdirected himself by determining that the Appellants should have instituted the urgent application to stop transfer of the shares even before Justice Makoni had given her judgment in Case No HC 10410/2011.

Rule 244 of the Rules of the High Court provides:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 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."

It follows that the Certificate of Urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required to consider the papers forthwith and has the discretion to hear the matter if he or she forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the judge is guided by the statements in the certificate by the legal practitioner as to its

urgency. In this exercise the court is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant.

In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts. GILLESPIE J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in *General Transport & Engineering (Pvt) Ltd& Ors v Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301, where he stated:[1]

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

Whilst the remarks of the learned judge were not concerned with the validity or otherwise of a certificate of urgency, they are apposite and pertinent in that the

[1] At pp 302E-303B

requirement that a lawyer must apply his or her mind to the facts of the case is emphasised. In order for a certificate of urgency to pass the test of validity it must be clear *ex facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute.

The appellants filed two chamber applications. Inevitably the court had to have recourse to the certificate of urgency which accompanied each of the chamber applications. The question of urgency was addressed in five paragraphs in Miss *Mapota's* certificate of urgency-viz, para(s) 5 to 9 in which she stated the following:

> "5. The first respondent issued summons out of this honourable court under Case No HC 3403/11 praying for an order that the applicants pay an amount USD2 700 000.00. The applicants defended the action on the basis that they are not indebted to the first respondent in any manner or in the amount claimed. Further, the applicants said that the agreement and sureties were void for illegality. The matter has been referred to trial and is awaiting set down.
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> 6. On 13 October 2011 the first respondent through his legal practitioners wrote to the applicants' legal practitioners stating that he had found a buyer for the Pelhams shares.
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> 7. On 20 October 2011, the applicants filed an urgent application seeking to interdict the first respondent and anyone acting for him from selling the shares. The matter was set down for 25 October 2011 which is the same date that the first respondent then purported to sell the shares. The sale was conducted after the first respondent had been served with an urgent chamber application to stop the sale.
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> 8. The urgency arises from the fact that although the first respondent instituted proceedings which were referred to trial, to enable him to claim the amount he alleges he lent to the first applicant he has now proceeded to liquidate the security which had been tendered by the first applicant. This in my view amounts to *paratie executie* and is unlawful.
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> 9. If the shares are transferred to second respondent the applicants will suffer irreparable harm because the shares can be freely traded to multiple buyers on the stock exchange and the applicants will have no recourse against *bone fide* purchasers".

When one considers the averments made in the certificate it is obvious and leaps to the mind that there is an omission in the manner in which the facts surrounding the

matter have been set out. There is no explanation as to what transpired on 25 October 2011 when the first urgent application was scheduled to be heard. The appellants in order to have their application heard as urgent had to explain what circumstances had arisen after 25 October to justify their need to have the matter dealt with on an urgent basis. The explanation of urgency in the certificate dealt with the execution by the first respondent of the security given to him by the first appellant. This is the same situation that existed when the initial urgent application was made. The complaint was that the first respondent had chosen to execute against the security instead of awaiting the outcome of the proceedings that had been instituted for payment of the monies that were alleged to be owed.

The belief that a matter is urgent must be a matter of substance rather than form. The genuineness of the belief postulated in the certificate must be tested by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard. The appellants have not denied that there is very little difference between the substance of the certificate of urgency signed by Miss *Mapota* to that signed by Miss *Njerere.* In both certificates the urgency is said to arise from the execution by the first respondent of the security granted in compliance with the loan. The words used are the same. The conclusion that Miss *Mapota* copied and pasted Miss *Njerere's* certificate of urgency is inescapable. Once such a finding is made it follows that Miss *Mapota* failed to apply her mind to the facts of the case before certifying the matter as being urgent.

In respect of the certificate signed by Miss *Mapota* the learned judge said:

> "Mr *Zhou* (now ZHOU J) for the applicants' response was that this was due to the there being a standard way of doing things among legal practitioners. Mr *Uriri*, however, argued that it was 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 p (p) 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 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) the second respondent questions the applicants' 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 applicants' attempt to amend that 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 learned judge cannot be faulted in his reasoning. There were pertinent issues regarding delays in instituting proceedings which should have been obvious had Miss *Mapota* been applying her mind. There was an evident delay in the proceedings which had to be explained before the matter could be considered as being of an urgent nature. The appellants had tendered the share certificates together with signed transfer forms. Once the due date for the settlement of the loan passed without payment, it must have occurred to the appellants that the first respondent had the right to sell the shares. The fear of irreparable

harm arising from the sale of the shares would have arisen on 10 March 2011. There is no explanation from Miss *Mapota* as to why no action was taken soon after 10 March 2011 to stop the sale.

As mentioned by the learned judge, Shah had on two occasions issued threats to liquidate the security. There were letters written by on behalf of Chidawu in answer to the threats. The threats would have caused fear of irreparable harm yet there was no explanation as to why action was not taken soon after the threats were uttered to stop the sale of the shares. This assumes paramount importance when regard is had to the fact that the shares had been tendered to Shah in negotiable form and could be transferred without the need to notify any of the appellants.

On 13 October 2011 the appellants were advised that Shah had found a purchaser for the shares and that they should pay the loan. They did not pay up approach the court immediately to obtain an interdict stopping Shah from liquidating the security. They did not even seek to engage the buyer. They issued a threat to institute legal proceedings but took no further action. There is no explanation as to why none was taken.

In addition, once an application to amend the draft provisional order to stop the transfer of the shares was dismissed by MAKONI J, the appellants would have been aware of the need to obtain an appropriate order interdicting the transfer of the shares to the purchaser. The appellants did not act immediately. They waited until 8 November 2011 before filing the application which is the subject of the appeal. They critically failed to explain why it had taken fifteen days to file an application that they sought to persuade

the court was urgent. In my view, primarily the failure by the appellants to act timeously when it was realised that the security was being liquidated by Shah, as well as the absence of an explanation as to why there was no action taken when the need arose, pointed to an abject failure on the part of Miss *Mapota*'s to apply her mind to the facts of the application before her.

The defects relating to her certificate of urgency show that *Mapota* was doing no more than parroting *Sarudzayi Njerere's* opinion as expressed in the earlier application. She failed to deal with patent and pertinent facts placed before the court by the parties. These facts were known to her at the time she certified the application as urgent. Critically the inescapable conclusion is that her opinion tested against the yardsticks of those common facts cannot stand scrutiny. It cannot be genuine. She did not apply her mind to the facts.

The appellants have contended that since the learned judge found that the application was not properly before the court by virtue of the defective certificate of urgency, the appropriate relief was to have the matter struck off the roll. It was argued that the learned judge erred by dismissing the application. It is therefore prayed in the alternative, that in the event that the Court finds that the certificate was defective, the matter be remitted to the High Court to be dealt with on the substantive issue of transfer of the shares.

The second respondent has, argued that the matter be dismissed as the relief sought by the appellants is no longer available as it has now been overtaken by events as the shares have been transferred. As contended by the second respondent, correctly in the view of this Court, courts exist to settle concrete and live disputes or controversies. There can be

no discernible benefit to be derived from this appeal being remitted. To remit the matter to the High Court would result in that court presiding over a matter where any judgment it passes would not benefit any of the parties. The shares have now been transferred for value to a purchaser who to all intents and purposes is *bona fide*. The appellants on the papers before the High Court did not challenge the *bona fides* of the purchaser. They are not asking for a reversal of the transfer but an interdict against transfer of the shares. What relief then would the High Court give in the circumstances? The argument by the second respondent that this is an abuse of court process has merit and finds favour with this Court. Courts should not be used to proffer legal advice and should only pronounce upon abstract questions and differing contentions in very rare circumstances. There would be no justification for embarking upon an abstract exercise in this case.

The appeal is dismissed with costs.

MALABA DCJ: I agree

OMERJEE AJA: I agree

Honey & Blanckenberg, appellant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners
Mtetwa & Nyambirai, second & third respondent's legal practitioners
Kantor & Immerman, fourth respondent's legal practitioners