TEVIOT TRUST (PVT) LTD
versus
KASEPLAN GRAND INDUSTRIES (PVT) LTD

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 6 December, 2022 & 4 January 2023

Urgent Chamber Application

Ms *L Dzumbunu*, for the applicant.
Mr *G Madzoka* with Mr *F Chimwamurombe*, for the respondent.

DEME J: The Applicant approached this court on an urgent basis seeking interim prohibitory interdict. The relief sought by the Applicant is couched in the following way:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this honourable court why a final order should not be made in the following terms:-
> 1. A final interdict be and is hereby granted against the Respondent, its agents, nominees and appointees barring from constructing any structures on Lot 1 A of Teviotdale, measuring 147,1169 Morgen held under Certificate of Title number 3873/56.
> 2. The Respondent to pay costs of suit on an attorney and client scale."

INTERIM RELIEF GRANTED

That pending the confirmation or discharge of this Provisional Order, the Applicant is granted the following relief;

1. "Applicant's application for an interim interdict be and is hereby granted.
2. An interim interdict be and is hereby granted against the Respondent, its agents, nominees and appointees barring them from constructing any structures on Lot 1A of Teviotdale, measuring 147,1169 Morgen held under Certificate of Title number 3873/56 pending the setting aside of the order granted under HC 3383/20.
3. In the event of non-compliance with the order aforesaid, the Sheriff of Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorised and directed to execute the order and give effect to it by any means authorised by law, including enlisting the services of Zimbabwe Republic Police.

4. The Respondent shall pay costs of suit on an attorney and client scale."

Facts in this matter seem to be common cause save as may be specified. The Applicant and the Respondent are companies duly registered as such in terms of the laws of Zimbabwe. Some time in 2004, the Minister of Lands compulsorily acquired the property known as Lot 1A of Teviotdale, measuring 147,1169 morgen, (hereinafter called "the property") held under certificate of title number 3873/56 which at the material time belonged to the Applicant. This piece of property was later awarded, through the offer letter, to the Respondent in 2011. The Applicant later approached this court under case number HC 3383/20 challenging the compulsory acquisition of the property. In default, the Applicant obtained the order restoring ownership of the property to itself. Consequently, certificate of title 3873/56 was restored by virtue of the order under case number HC 3383/20.

Later, the Applicant served the Respondent with an application for eviction under case number HC 3737/22. The Respondent simultaneously filed two applications namely urgent chamber application for the stay of execution filed under case number HC 4179/22 and application for rescission of default judgment filed under case number HC 4174/22. Both applications are pending before this court. The Respondent was granted the interim relief for the stay of execution prayed for under case number HC 4179/22. In this case, the confirmation or otherwise of the provisional relief is what is pending before this court.

According to the Applicant, the Respondent failed to prosecute the two applications within the stipulated time frames. Consequently, against the two applications, the Applicant filed two chamber applications seeking orders for the dismissal of the two applications for want of prosecution. The two chamber applications are still pending before this court.

The Applicant further averred that on 21 November 2022, it discovered that the Respondent was carrying out some preparatory works for the construction of the perimeter wall around the disputed property. According to the Applicant, the Respondent was supposed to consult it as the lawful owner of the property and this was never done.

The present application was strongly opposed by the Respondent. The first basis for opposing the present application was that the Applicant's terms of final order seem to permanently interdict the Respondent from constructing any structure on the disputed property and ignores that ownership is still being contested by the parties hereto. According to the Respondent, the nature of the final order sought would seriously negate its rights under

case number HC 3383/20 which may be reheard if the application for rescission for default judgment filed under case number HC 4174/22 is successful. It is the Respondent's contention that it has prospects of success in the matter under case number HC 3383/20 as the Applicant did not cite it despite the fact it was and still is in occupation of the property. The second leg of the opposition by the Respondent is that the Applicant suffers no prejudice as a result of the erection of the perimeter wall. The Respondent is of the view that the perimeter wall will add value to the property. Thirdly, the Respondent averred that the balance of convenience favours the dismissal of the present application. Fourthly, the Respondent further submitted that the Applicant has alternative remedy as it can wait for the outcome of the matters before the court. The Respondent further maintained that the Applicant could have anticipated the matter under case number HC4179/22 instead of filing the present application. The Respondent prayed for the dismissal of the present application with costs on an attorney and client scale.

The Respondent raised the following five points *in limine:*

1. That the certificate of urgency is defective for failure to aver critical factors.
2. That the present application is not urgent.
3. That the failure to join the Minister of Lands makes the application fatally defective.
4. That the present application lacks legal basis given that the dispute of ownership of the property was suspended under case number HC 4179/22 which stayed the execution of judgment under case number HC 3383/20.
5. That the Applicant suffers no irreparable harm as a result of the acts complained of.

However, the Respondent abandoned all points *in limine* with the exception of the first two points *in limine*.

It was the Respondent's argument that the certificate of urgency filed is defective in many respects. Firstly, the Respondent claimed that the certificate of urgency does not disclose the date when the need to act arose. Further, the Respondent also affirmed that the certificate of urgency does not specify the steps taken by the Applicant when the need to act arose. Thirdly, the Respondent also contended that the certificate of urgency does not specify the nature of irreparable harm likely to be suffered by the Applicant if this matter is not heard on an urgent basis. Because of the defective certificate of urgency, the Respondent prayed

that this matter should not be regarded as urgent as there is nothing in the certificate of urgency that suggests that the present application is urgent. The Respondent's legal practitioner referred the court to the case of *Chidawu and Others* v *Sha and Others*[1], where the court made the following observations:

> "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."

On the other hand, the Applicant's counsel, Ms Dzumbunu submitted that the matter remains urgent for the reasons specified in the certificate of urgency and the founding affidavit. She further argued that there is no fixed rule for preparing the certificate of urgency. Alternatively, she applied for condonation of the defects complained of particularly the failure to specify the date when the need to act arose. She further argued that this court should only entertain the preliminary points where they are capable of resolving the matter before it. She referred the court to the case of *The Prosecutor General* v *Busangabanye and Anor*[2], where MATHONSI J, as he then was, postulated the following pertinent remarks:

> "Mr *Manase* who appeared for the first respondent took a point in *limine* that the matter is not urgent by reason, *inter alia*, that the need to act arose when the magistrate sentenced Tagara on 18 March 2015. For the applicant to have waited 22 days to file the application means that this is now self-created urgency not contemplated by the rules.
> In my view this issue of self-created urgency has now been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points in *limine* centred on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust.
> I am satisfied that this application was brought within a reasonable time and that it is one which deserves to be heard on an urgent basis. I accordingly dismiss the point in *limine."*

[1] SC12/13.
[2] HH427/15.

From the case of *Chidawu* (*supra*), it is apparent that the certificate of urgency is key in outlining the case before the court. Without the valid certificate of urgency, there may be no proper urgent chamber application before the court.

However, it is critical to juxtapose the *Chidawu* case (*supra*) with the present case in order to come to the conclusion of whether the present application is entirely similar to the facts of the *Chidaw*u case (*supra).*

Paragraphs 7-9 of the certificate of urgency filed for the purposes of the present application are as follows:

> "7. If the Honourable Court is not allowed to intervene, the Applicant who has more legitimate claim stands to suffer monetary loss and having its rights in the farm infringed to its prejudice and detriment.
>
> 8. The Applicant has treated the matter as urgent by acting as soon as the duty to act arose, when it discovered there was construction taking place on the farm.
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> 9. The actions of the Respondent indicate that if left unchecked the Respondent will construct other structures of a permanent nature on the farm regardless of the fact that it has no right over same. The Respondent's conduct demonstrates it can do worse if not interdicted immediately."

The certifier only omitted to specify the date when the need to act arose. The certifier averred that the Applicant will suffer financial loss if this court does not intervene in paragraph 7 of the certificate of urgency. Further, the Certifier also stated that the Respondent may erect permanent structures at the property if the acts of the Respondent are allowed to go unchecked. Reference is made to paragraph 9 of the certificate of urgency. It is clear that permanent structures, if erected at the property, may create a right of lien in favour of the Respondent which may force the Applicant to compensate the Respondent if the dispute for the property is resolved in favour of the Applicant. This foreseeable compensation may prejudice the Applicant. The language of certificate of urgency is consistent with the founding affidavit in many respects. Thus, the present case can be distinguished from the case of *Chidawu* (*supra*) as the certificate of urgency filed does substantially comply with the basic requirements.

I see no reason in denying the application for condonation made by the Applicant through its counsel especially when there is no evidence of prejudice advanced by the opposite party. This court is empowered in terms of Rule 7 of the High Court Rules, 2021, formerly Rule 4C of the repealed High Court Rules, to condone some minor infractions of its Rules. Reference is made to the case of *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe and Others*[3], where the court made the following important remarks:

> "I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission."

I respectfully associate myself with the opinion of the Court in the case of *Telecel Zimbabwe (Pvt) Ltd (supra)*. I therefore dismiss the point *in limine* concerned.

The Counsel, Mr Madzoka, submitted that the present matter is not urgent. On the other hand, Ms Dzumbunu argued that this matter remains urgent as the Applicant may be locked out of its property. Mr. Madzoka made a counter-argument that the Applicant currently does not own the property. It is my considered view that the order under HC 4179/22 which stayed the proceedings did not set aside the decision of this court under case number HC 3383/20. Until such judgment is set aside, the Applicant remains concerned with the developments that take place at the property. Having discovered that there are developments on 21 November 2022 at the property, the Applicant moved with lightning rapidity to harness the situation by approaching this court on 1 December 2022, ten days later. According to the case of the '*Prosecutor General (supra)',* the court held that a delay of 22 days is not an inordinate delay as litigants do not eat, move and have their being in filing court process. Resultantly, I dismiss the point in limine in question.

[3] HH446/15.

Having dealt with preliminary points, I will now shift my attention towards the merits of the present matter. The sole issue for determination is whether the present application meets the requirements of the provisional order. The Applicant for the Provisional Order must satisfy the following four requirements:

1. Existence of a prima facie right though open to doubt.
2. A well-grounded apprehension of irreparable harm.
3. The absence of any other satisfactory remedy.
4. That the balance of convenience favours the Applicant.

These requirements have been established in the cases of *Setlogelo* v *Setlogelo*[4] and *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt Ltd and Another*[5]. The Applicant correctly averred in its founding affidavit that by virtue of the order under case number HC 3383/20, the Applicant has a *prima facie* right. According to the Applicant, the same order set aside the offer letter which had been issued in favour of the Respondent. If the acts complained of are not prohibited, the Applicant will have restricted access to the property in question. This will result in irreparable harm to its rights in the property in question. Further, the Applicant's harm can also assume the shape and form of or financial nature as the Applicant may be forced in future to compensate improvements erected by the Respondent at the property. The Applicant's fear is heightened by the Respondent's averments in paragraph 28 of the opposing affidavit where the Respondent stated that:

> "This is disputed. The construction of the precast wall at the property in question does not cause any harm to the rights of the Applicant. Be it as it may, the construction put to the wall can actually be construed to be value addition to the property on the grounds whoever is going to be favoured by the decision or outcome of pending cases. Considering the fact that the fate of the farm still hangs in the balance."

It is apparent that the Respondent is alive to the fact that the erection of the perimeter wall will add value to the property. Hence, chances for claiming compensation for value added to the property are high. Thus, the Applicant may be forced to compensate the Respondent for the improvements which may be unnecessary to its business. This will resultantly cause pecuniary harm to the Applicant.

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[4] 1914 AD 221.
[5] 1980 ZLR 378

The Respondent initially submitted by way of opposing affidavit that the perimeter wall is meant to enhance the security of the property. However, during oral submissions, Mr. Madzoka submitted that the perimeter wall was intended to be put at the front side of the property in order to block the dust from the nearby site. The question which remained unanswered is why did the Respondent immediately become concerned with security or health issues when it had been in occupation of the property since 2011. This makes the Applicant's suspicion well grounded.

With respect to whether there is any other remedy, the Respondent's counsel submitted that the Applicant can wait for the outcome of the two pending cases filed by the Respondent under case number HC 4174/22, which is an application for rescission of default judgment and case number HC 4179/22 which is pending confirmation or otherwise of the Provisional Order for the Stay of Execution. It is apparent that the Respondent is the *dominus litis* in the two cases which should drive them instead of the Applicant. Further, the Respondent did not dispute that there are two pending applications for the dismissal of the two aforementioned Respondent's cases for want of prosecution filed by the Applicant. Hence, it is evident that the Respondent is moving with sluggish proclivity in expediting the finalisation of the two cases. Therefore, the remedy proposed by the Respondent cannot effectively deal with the present situation as the Applicant is not the *dominus litis* in such cases. I am of the view that there is no satisfactory remedy that can effectively protect the rights of the Applicant with the same speed and effect. This present application is the most appropriate remedy available to the Applicant in the circumstances. The alleged defects highlighted by the Respondent in the terms of the final order will be addressed by the court at the appropriate time at the confirmation or otherwise of this order.

With respect to the balance of convenience test, I am of further opinion that balance of convenience favours the granting of the present application. The Respondent will not suffer any prejudice if the present application is granted. The Respondent is in occupation of the property. The Respondent has not demonstrated the need for erecting additional structures at the property. On the other hand, the Applicant will be prejudiced if the Respondent is allowed to continue with developments at the property which is *res litigiosa.* It is in the interest of justice that improvements be stayed until the disputes between the parties hereto have been resolved by the court. Allowing the improvements to be erected at the property

before the finalisation of the pending cases will complicate the resolution of the dispute between the parties. Accordingly, I see no reason why the Applicant should not be entitled to the relief as prayed for.

The Applicant had prayed for costs on an attorney and client scale. I am of the view that costs on an ordinary scale are reasonably sufficient. Punitive costs are reserved for exceptional cases. There are no special circumstances justifying the awarding of punitive costs against the Respondent.

In the premises, it is ordered that the Provisional Order be granted with consequential amendments to the issue of costs.

Mlotshwa Solicitors Titan Law, applicant's legal practitioners.
Chimwamurombe Legal Practice, respondent's legal practitioners.