HB 47/18
HC 888/17

MATUPULA HUNTERS (PVT) LTD

Versus

TSHOLOTSHO RURAL DISTRICT COUNCIL

And

LODZI HUNTERS

And

DISTRICT ADMINISTRATOR OF TSHOLOTSHO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 7 NOVEMBER 2017 & 1 MARCH 2018

Opposed Application

J. Sibanda for the applicant
Advocate L. Nkomo for the respondents

MAKONESE J: Order 32 Rule 247 of the High Court Rules provides in peremptory language as follows:

> **"247 Provisional order**
>
> (1) Subject to rule (3), a provisional order shall –
> (a) be in Form 29C; and
> (b) specify upon whom copies of the provisional order and the application, together with all supporting documents, shall be served and if service is not to be effected in terms of these rules, how service is to be effected; and
> (c) specify the time within which the respondent shall file a notice of opposition if he opposes the relief sought."

On the 28th of March 2017 the applicant filed an urgent chamber application seeking a provisional order with interim relief interdicting 1st respondent from issuing a hunting permit to 2nd respondent in respect of Tsholotsho North Concession and if such permit has been issued, interdicting the 2nd respondent from conducting any hunting in the Tsholotsho North Concession pursuant to such permit. The urgent chamber application was served on the respondents on the

28th of March 2017. The application was heard by TAKUVA J on the 3rd of April 2017 and after hearing the parties' judgment was reserved. At the hearing of the application, 1st and 2nd respondents were represented by their legal practitioners of record, which the 3rd respondent appeared in person. The respondents did not file any opposing papers prior to the hearing of the urgent chamber application because in terms of the High Court Rules, 1971 there are not required to do so. Judgment was delivered in the matter on the 4th of May 2017 on the chamber application, granting interim relief sought by the applicant in the draft order. On the same date, applicant's legal practitioner wrote to respondent's legal practitioners advising them that the provisional order ad been granted, and that, the respondents must comply with the order.

On the 8th of May 2017 the respondent's legal practitioner wrote to the applicant's legal practitioner indicating that they had uplifted a copy of the court judgment granting the provisional order. In the same letter, the respondent's legal practitioner called upon the applicant's legal practitioner to formally serve the provisional order to enable the respondents to file opposing papers, counting the *dies induciea* from the date of service.

On the 10th May 2017 the applicant's legal practitioner addressed a letter to the respondents' legal practitioner to the following effect:-

> "Job Sibanda & Associates
> Legal Practitioners
> **Bulawayo**
>
> Dear Sir
>
> **Re: Matupula Hunters (Pvt) ltd vs Tsholotsho Rural District Council & Lodzi Hunters & Anor Case No. HC 888/17**
>
> Thank you for your letter of the 10th May 2017.
>
> We definitely do not agree with you that a provisional order binds the respondent without being served. You will notice on perusal of any provisional order that you have obtained in the past, that the last paragraph deals with the service of that order.
>
> It is the provisional order that specifically states that respondents should file its opposing affidavit if it so wishes within 10 days of service of the order.

The judgment does not say that, hence our suggestion that you must uplift the provisional order and serve it.

Secondly, as you know in an urgent application, the court may even grant an order without hearing the other party.

Where the Judge wants to hear the respondent, the respondent may not even file opposing papers but can argue the matter orally and as the hearing of the matter is done urgently not after the expiration of 10 days. The question of dies induciae is only mentioned in the provisional order. Please investigate this matter and even discuss it with someone else. We are sure you will discover that we are correct. If we are indeed correct, please comply, so that we can make progress.

Yours faithfully

Webb, Low & Barry
Incorporating Ben Baron & Partners"

(a) that he would not serve the provisional order on the respondents because the respondents took part in the proceedings which resulted in the issuance of the provisional order. The respondents were accordingly deemed to have known of the provisional order as soon as the judgment was handed down.

(b) The documents in support of the provisional order were served on the respondents on the 28th March 2017 and the *dies induciae* for filing the opposing papers commence from that date. As far as applicant was concerned, the respondents were duly barred as these documents were served on 28 March 2017.

On the 11th of May 2017 respondent's legal practitioners wrote to applicant's legal practitioner in response to the letter of the 10th May 2017. In this letter respondent's legal practitioner states as follows:-

On 17th May 2017 applicant's legal practitioner wrote a further letter to respondent's lawyers maintaining that his interpretation of the law and the rules on the service of the provisional order is correct and that the interpretation by respondent's legal practitioner is

incorrect. The applicant's legal practitioner gave notice that if the respondents file opposing papers in the mater, a point *in limine* on the grounds that the respondents had been automatically barred. The applicant has persisted in the matter before me with the argument that the respondents are barred and may not be heard until they have applied for the upliftment of the bar. The applicants contend that it cannot be seriously contended that having been served with the papers prior to the issuance of the provisional order, respondents should have been served a second time with the same set of documents after the granting of the provisional order, for the purpose of filing opposing papers in respect of the confirmation or discharge of the provisional order. The crisp argument put forward by the applicant is summerised in applicant's heads of argument in the following manner:

> *"It is submitted that to hold that a respondent who has been served with an urgent chamber application and supporting affidavits and has attended before a Judge in chambers to argue against issue of the provisional order should be served again with a provisional order after it has been issued, for purposes of calculating the dies induciae, in respect of confirmation of the order, would be to do violence to the law and create uncertainty therein."*

On the 22nd May 2017, without having been served with the provisional order, and out of an abundance of caution respondents filed their notice of opposition and opposing affidavits. On the 16th of June 2017 the applicant filed its answering affidavit wherein it raised a point *in limine* to the effect that the respondents were duly barred and that there was no proper opposition to the confirmation of the provisional order in that respondents filed their opposing papers outside the 10 day period calculated from the 28th of March 2017, the date the urgent chamber application was served upon them. The applicant persists with the point *in limine* in its heads of argument.

Whether the matter is properly before the court

From the factual background set out herein it is clear that the matter is not properly before me. An applicant who seeks confirmation of a provisional order which he deliberately and inexcusably refused to serve upon the respondents in compliance with the rules of court may not seek the indulgence of this court. The applicant has persisted with a wrong and untenable contention on an issue that is clearly dealt with by the rules of this court. If service of the

provisional order granted by the court is not effected upon the respondents in terms of the order how is the 10 (ten) day period required for the service of the opposing papers calculated? It cannot be seriously suggested that the 10 (ten) day period is calculated from the date the urgent chamber application was served. That is not what is envisaged by the rules.

In any event, it is observed that, in the first place the applicant attached a defective draft provisional order to the urgent chamber application, the defect being that there was no portion dealing with serve of the provisional order as required by Rule 247 of the High Court Rules. In my view, however, the defect did not go to the root of the application. A provisional order was granted and what this court is simply seized with are the following issues:-

1. Whether the matter is properly before the court given applicant's willful refusal to serve the provisional order upon respondents.
2. Whether the applicant has made a good case for confirmation of the provisional order in terms of the final order sought.

I have already intimated that the consequence of the willful refusal by the applicant's legal practitioner to serve the provisional order upon the respondents is that the respondents were never properly put on terms to file their opposing papers within the stated *dies induciae*, which is calculated with effect from the date on which the provisional order is served on respondents. The contention by the applicant's legal practitioner is wrong and untenable is exposed by a cursory examination of the material facts of the matter. The urgent chamber application was filed and served on respondents on the 28th of March 2017. The urgent chamber application was only heard on the 3rd of April 2017. The provisional order was granted on 4th of May 2017. If one follows the reasoning advanced by applicant's legal practitioner, the respondents ought to have filed papers opposing "confirmation of the provisional order" within 10 days after the 28th March 2017, that is, by the 11th April 2017, which is way before the provisional order was granted. In that event what would the respondents be opposing prior to the granting of the provisional order?

Disposition

It is may view that that it is procedurally irregular and improper for the applicant to seek confirmation of a provisional order which it has deliberately refused to sere upon the respondents. The matter is clearly not properly before the court. *Mr Sibanda*, appearing for the applicant referred me to the case of *Ex parte ZIMASCO (Pvt) Ltd* HH-53-16, a decision by CHITAPI J. Whilst the facts in that matter are not similar to the circumstances of this case, the dicta at page 3 of the cyclostyled judgment is apposite in that the learned judge remarks as follows:

> "*I agreed with counsel for the parties that if I rule in favour of the respondents on the points in limine, I would adopt a procedure akin to what obtains with urgent chamber applications whereby the respondent filed opposing papers and is heard and where the opposition is dismissed, a provisional order is nonetheless issued with the respondent being afforded another opportunity to oppose confirmation of the provisional order* …" (emphasis added)

It seems to me that from the above cited remarks, the respondent is afforded an opportunity to oppose confirmation of the provisional order upon proper service of the order. This is for the simple and practical reason that the *dies indiciae* cannot possibly be calculated from the date of service of the urgent chamber application.

At the close of submissions, I asked the parties what the court should do in the event that the point in limine was dismissed. Advocate Nkomo, appearing for the respondents suggested that in the event that the court finds that the provisional order was not properly served upon the respondents, then the matter is not properly before the court, and the matter ought to be struck off the roll. I did not hear the parties on the merits and if the point *in limine* is dismissed it should follow that I may hear the parties on the merits. Opposing papers were filed, heads of arguments were filed by both parties and no prejudice has been occasioned to both applicant and the respondents.

In the result, it is ordered as follows:

1. The point *in limine* raised by the applicant is hereby dismissed.
2. The parties are directed to set down the matter for hearing on the merits.
3. The applicant shall pay the wasted costs.

Job Sibanda & Associates, applicant's legal practitioners
Webb, Low & Barry, respondents' legal practitioners