CENTRAL AFRICAN BUILDING CONSTRUCTION COMPANY (PVT) LTD
versus
CONSTRUCTION RESOURCES AFRICA (PVT) LTD
and
DANNY MUSUKUMA
and
LINCEWESI MUSUKUMA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 9-13 March 2009

Urgent Chamber Application

Mr. *Paul*, for the applicant
Mr. *Chivinge*, for the 2nd and 3rd respondents

CHATUKUTA J: The applicant seeks, on an urgent basis, an interdict to restrain the 1st, 2nd and 3rd respondents (herein jointly referred to as respondents) from using a replacement Deed of Transfer No. 6884/92. Mr Paul Christopher Paul deposed to the Founding affidavit in his capacity as the director of applicant.

The background to the application is that on 29 November 2004, the applicant sold to 1st respondent certain three pieces of land. Messrs Louis and Jose Eduardo da Silva Viera were the directors of applicant. In January 2005, one of the directors, Louis Viera, signed a document appointing the 2nd and 3rd respondents as Directors of applicant. On 9 January 2007, the applicant issues summons in the High Court in Case No HC 109/07 seeking the eviction of the 1st respondent from the three properties. The claim was defended. Subsequent to that action, the respondents applied for and obtained replacement deeds of transfer in respect of the three properties. Two of the properties were transfer to third parties using the replacement deeds of transfer. The property held under Deed of Transfer No. 6884/92 has not yet been transferred. The applicant fears that the respondents will dispose of the property and transfer it to a third party hence the present application for an interdict.

The above facts are those that appear to me not to be in issue and are relevant for the determination of this matter.

The respondents opposed the application. Two points have been raised *in limine*. The first point is that the matter is not urgent. The second point is that Mr Paul Christopher Paul is not a director of the applicant company and does not have the authority to institute these proceedings on behalf of the applicant. It was contended that the 2nd and 3rd respondents were the duly appointed directors of the applicant. They had not authorized Mr Paul to institute these proceedings.

It appears to me that this application can be disposed of by the determined of the first point. The respondents contended that the matter is not urgent. *Mr Chivizhe*, for the respondents, submitted that the certificate of urgency does not disclose the basis upon which the legal practitioner who certified the matter urgent did so. He submitted that the Founding Affidavit also did not disclose the basis upon which the application should be heard urgently. It was further submitted that the 2nd and 3rd respondents have been managing the applicant's affairs from November 2004 when the parties entered into an agreement of sale. After their appointment as directors in 2005, the 2nd and 3rd respondents have been making decisions on behalf of the company. The applicant has not over the years sought to interdict it from managing the affairs of the applicant. This is despite the fact that the applicant sued the 1st respondent for ejectment in 2007 in case No. HC 109/07. The matter was referred for trial in June 2007. Since then the applicant has not taken any action to prosecute the matter. One of the issues that was referred to trial is whether or not the 2nd and 3rd respondents are the applicant's directors. The applicant was therefore not diligent in restraining the two respondents from exercising their powers as directors of the applicant over the past years.

Mr Paul, for the applicants, contended that the urgency arose from the disposal of two of the properties to third parties. It was contended that the applicant only became aware of the disposals a few days before an extraordinary meeting that was held on 17 February 2009. It was contended that the urgency of the matter was that the 2nd and 3rd respondents made a false statement that the deeds of transfer of the properties that the 1st respondent bought were lost. This was despite the fact that at the time when the pre trial

conference was held, the respondents were aware that the applicant's legal practitioners of record had the original deeds in their possession.

It is my view that the certificate of urgency is highly inadequate. It is brief and does not establish the basis upon which Mr Jori certifies that the matter is urgent. In *General Transport and Engeneering P/L and Ors v Zimbank* 1998 (2) ZLR 301 (H) at 302E-303B, it was held that a certificate of urgency must not be taken lightly. It is intended to assist the court in determining whether or not a matter is urgent. It appears to me that Mr Jori did not address his mind to the issue at hand. The totality of his certificate is captured in one paragraph. The paragraphs does not state when the alleged fraudulent acts were discovered and why this application comes after disposal of two other properties presumably with the use of the Replacement Deeds of Transfer.

It also appears to me that the founding affidavit does not specify when the applicant became aware of the respondent's fraudulent acts. Upon inquiry on the issue, *Mr Paul* referred me to paragraph 17 of the Founding Affidavit. The paragraph reads:

> " 17 That the issue of the replacement title deeds to the two properties and the sale of the 2 properties has only now been ascertained as a result of a search being conducted in the deeds registry."

Mr Paul submitted submitted that the "now" in the paragraph meant that the applicant had become aware of the urgency on or about the time when the Founding Affidavit was signed. The response by *Mr Paul* was, in my view, inadequate. *Mr Paul* is the applicant's legal practitioner. He should, in my view, be aware of the date when the fraudulent acts were discovered. The date when the fraudulent acts were discovered would establish whether or not the applicant acted diligently. The court cannot be expected to read into the Founding Affidavit that "now" means the date of signature of the Founding Affidavit. The explanation given by *Mr Paul* during oral submissions that the applicant became ware of the acts before the extra ordinary meeting is not contained in the Founding Affidavit. The explanation is not contained in the Answering Affidavit either, despite the issue having been raised in the Opposing Affidavit. As submitted by *Mr Chivhinge*, the application must stand or fall on the Founding affidavit. In this case it falls on the Founding Affidavit.

It appears to me that the applicant sat on its rights until the respondents disposed of the two properties. As from the time the agreement of sale was concluded, the respondents were running the affairs of the applicant. The applicant was aware that the 2nd and 3rd respondents were holding themselves out as its directors. In case No. HC 109/07, the 2nd and 3rd respondents pleaded that they were the applicant's directors. In fact, they are also challenging, in that case, the authority of one of the Vieras to institute those proceedings. It is my view that the applicant did not have to wait for a fraudulent act for it to bring this action. As stated in *Kuverega v Registrar General* 1998 (1) ZLR 188 at 193F-G:

> "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."

The respondents' contention that this matter would not have been before me had the applicants diligently prosecuted their action finds favour with me. The matter was referred to trial on 15 June 2007. The matter was set down for trial for 16 July 2007, a month after it was referred to trial. The matter could not take off then at the request of the applicant contained in a letter dated 13 July 2007, because Mr Viera required time to make travel arrangements to come to Zimbabwe from Australia. It appears from the record that the applicant has not taken any action, from that time, to ensure that the matter is heard. The applicant therefore allowed the respondents to continue running its affairs for almost two years before they brought this application.

In the result, the application is dismissed with costs.

Messrs Wintertons, applicant's legal practitioners
Chivinge & Company, 2nd and 3rd respondents' legal practitioners