TONY RENATO SARPO
versus
WAYNE WILLIAMS
and
REGIS MABURITSE
and
MATEBELELAND ENGINEERING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 February and 1 March 2017

Urgent Chamber Application

K T Madzedze, for the applicant
T M Kanengoni, for the 1st, 2nd and 3rd respondents

TAGU J: This is an urgent chamber application for an interdict barring the first and second respondents and any persons acting through them from interfering with the applicant as he retrieve his assets which are currently sitting on the third respondent's premises in Msasa Harare.

The history of the matter as presented by the applicant in his founding affidavit is that sometime in November 2012 the applicant purchased 50% of the issued share capital in the third respondent from an individual named Gareth Fury. The other 50% shares were owned at the time by the first respondent who remains the owner to date. The third respondent is an engineering company whose core business is the manufacturing and repairing of apparatus, equipment, machinery, plant tools and appliances as well as buying and selling of such items. It had branches in Harare and in Bulawayo. Prior to the applicant entering into this agreement of sale of shares he had been running a company called Peppy Motors (Private) Limited which dealt in buying and selling motor vehicles, repairing them and selling motor spares. He was also running another company called Hothfield Enterprises (Private) Limited and he had a farm in Chiredzi. Upon acquiring 50% shares in the third respondent he became a director in that company by virtue of his shareholding as per CR 14 marked Annexure "B" in the

record. Given that he was spending a lot of time at the third respondent's business he moved a vast number of his personal and clients' assets onto the premises of the third respondent between 2012 and June 2016. He averred that he moved these assets onto the third respondent's premises for storage purposes only.

Trouble started around 2 June 2016 when he had misunderstandings with the first respondent with the result that he informally intimated that he no longer wished to continue with the business relationship and that he would pull out of the company. He communicated this with the first respondent to the effect that the parties had to quantify the value of his shares, together with the loans due to him from the third respondent as per practice and after such quantification, and payment of all his dues he would legally seize to be a shareholder in the third respondent and resign as a director. The first respondent agreed to this.

However, on 21 June 2016 he received a call from the second respondent whom he had neither met nor heard of before. The second respondent introduced himself as an employee of the President's Office who advised them to attend a meeting to discuss non-payment of workers in Bulawayo by the applicant. The meeting was convened on 22 June 2016 and the second respondent reiterated that he was from the President's Office. The second respondent was in the company of one Tonderai Chadiwa. The second respondent was accusing the applicant for the losses being made at Bulawayo. The meeting was then adjourned to 27 June 2016 to enable the applicant to produce documentation to prove that the allegations by the second respondent were false. On 27 June 2016 the second respondent called the applicant at short notice and advised him that the meeting was taking place that morning. The applicant failed to attend due to other pressing commitments.

Later that same day the applicant was shocked when the second respondent called him and told him that the applicant was banned from setting foot on the premises of the third respondent. The second respondent further advised the applicant that all the applicant's personal assets which were situated at the premises of the third respondent had been sized. The second respondent then threatened the applicant with harm against himself and his family if he disregarded what the second respondent was telling him. He further issued orders to employees at the third respondent not to report to the applicant and that the applicant's personal assets had been converted into company assets. The first and second respondents then proceeded to fraudulently change the CR 14 for the third respondent to indicate that the applicant had resigned and that the second respondent had been appointed as the director of the company as per annexure "D" attached to the record. The applicant later discovered that

the first and second respondents had connived and were in cahoots in this illegal takeover of the applicant's interests in the third respondent and his personal assets.

The applicant then immediately approached the CID Serious Frauds Department to report the matter under DR08/2016. He further engaged an attorney Mr Tamuka Moyo who recommended that he file for liquidation of the third respondent in order for him to recover all his dues and value of his shares whilst the police were handling the fraud matter. The liquidation application was then filed on 12 September 2016 under case number HC 9207/16. Meanwhile the applicant made several follow-ups with the CID after noticing that the matter was not moving fast and all his efforts were in vain. Recently the CID Officers then advised the applicant that they could not assist the applicant since the matter was a civil one. It was against this background that the applicant then filed this urgent chamber application seeking the following relief-

> **"TERMS OF FINAL ORDER SOUGHT**
>
> That you show cause to the Honourable Court why a final order should not be made in the following terms-
>
> 1. Respondents and any persons acting through them, be and are hereby interdicted from interfering with or otherwise disrupting Applicant from collecting his assets from 3rd Respondent's premises, at any given time.
> 2. 2nd Respondent, be and is hereby interdicted from issuing threats of harm to Applicant and from preventing or disrupting Applicant from carrying out his activities at 3rd Respondent.
> 3. 1st and 2nd Respondents shall pay the costs of suit.
>
> **INTERIM RELIEF GRANTED**
>
> Pending determination of this matter, the Applicant is granted the following relief:
>
> 4. Respondents and any persons acting through them, be and are hereby interdicted from interfering with or otherwise disrupting Applicant from collecting his assets from 3rd Respondent's premises.
> 5. 1st and 2nd Respondents shall pay costs of suit.
>
> **SERVICE OF PROVISIONAL ORDER**
>
> This provisional order shall be served on the Respondents by the Applicant's Legal Practitioners or by the Deputy Sheriff."

Mr *Kanengoni* for the respondents took three points *in limine*. The first point was that this matter is not urgent because this application was made on 14 February 2016 yet the cause of action arose in June 2015. He said there was a delay of 7 months and that the report that was made to the police did not take away urgency and in any case that report did not yield

anything. He said the principles of what constituted urgency as stated in the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H) were not satisfied. The second point *in limine* was that there was a material non-disclosure of facts by the applicant in that the applicant failed to disclose that it once made an application for liquidation of the third respondent. See *Graspeak Investments (Pvt) Ltd* v *Delta Operations (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H). Finally he said the application is fatally defective in that the final relief sought is the same as the relief sought in the Provisional Order. See *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H).

URGENCY

On the issue of urgency Mr *Madzedze* submitted that when dealing with the issue of urgency, each case has to be decided on its own circumstances. He confirmed the principles stated in the *Kuvarega* v *Registrar General & Another case supra*, and went on to say that the issue the court has to consider is whether or not the applicant acted when the need to act arose. In making that decision he said it does not mean taking the correct steps, but whether a party waited for the day of reckoning without doing anything at all. In *casu* he said the applicant was threatened by the second respondent to be harmed. As a lay person who was threatened by the second respondent who claimed to be from the President's Office he feared for himself and his family hence immediately went to the police right away to make a report. He then constantly made follow ups on the case and on the state of his assets which he wanted to retrieve. He referred the court to a letter dated 17 November 2016 addressed to the Officer Commanding Serious Frauds, Harare where he was complaining about the slow pace with which the police were investigating his case. He referred the court to the recent case of *Redan Petroleum (Private) Limited & Spring and Autumn (Private) Limited* v *Shumba Holdings (Private) Limited and Outside In Leisure (Private) Limited and Temba Mliswa and The Minister of Lands and Rural Resettlement* HH 358/16 where the court ruled that a party cannot be penalised for not taking the correct measure as long as it can be proved that the party took some actions when the need to act arose.

According to him the need to act and to take the correct measure only arose recently when the police in response to his letter of complaint above advised him that they could not assist him to recover his assets because this is purely a civil and not criminal matter.

In my view the seven months that went by are not months which went by without the applicant taking any action. He took the current position after the police told him they cannot assist him to recover his assets. Looking at the surrounding circumstances of this case the court is satisfied that urgency has been proved and any delay was explained in the founding affidavit. For these reasons the first point *in limine* is dismissed.

MATERIAL NON-DISCLOSURE

Mr *Kanengoni* raised the second point *in limine* that there was material non-disclosure by the applicant *vis a vis* an application that the applicant initially made for liquidation of the third respondent. Mr *Madzedze* submitted that that application did not take away the urgency of the matter and in any case that application had nothing to do with the present case. However, in my view the applicant in para 25 of his founding affidavit stated that:

> "I further engaged an attorney, Mr Tamuka Moyo, to assist me in the matter. He recommended that I file for liquidation of the 3rd Respondent in order for me to recover all my dues and the value of my shares, whilst the police were handling the fraud matter together with the matter relating to retrieving my assets. The application for liquidation was filed by Messrs Tamuka Moyo Attorneys on 12 September 2016, under case number HC 9207/16. A copy of the application is attached hereto as Annexure "F".

It follows therefore that the applicant disclosed that application. What the applicant did not say was the outcome of that case. Be that as it may that non-disclosure is not fatal to the applicant's case. The second point *in limine* is accordingly dismissed.

FINAL ORDER SAME AS PROVISIONAL ORDER

The last point *in limine* was that the final order sought is the same as the provisional order sought. At law it is not permission to seek a final order in an application of this nature. The counsel for the applicant disputed that the final order and the provisional order are the same. A reading of the two orders clearly shows that the final order contains three paragraphs, two of which spell out what each respondent is interdicted from at any given time and the last talks of costs of suit. The provisional order clearly says that pending the determination of this matter, the respondents are interdicted from interfering with the applicant from collecting his assets from the third respondent. While the two orders may appear the same they are not substantially the same. I find no merit in the third point *in limine* and it is dismissed.

ON THE MERITS

This is an application for an interdict. The requirements of such an application are well settled. What the applicant needs to establish is:

1. A clear or *prima facie* right, though open to doubt,
2. A well -grounded apprehension of irreparable harm if the relief is not granted,
3. The balance of convenience,
4. That there is no other satisfactory remedy. See *Setlogelo* v *Setlogelo* 1914 AD 221, *Enhanced Communications Network (Pvt) Ltd* v *Minister of Information, Post & Telecommunications* 1997 (1) ZLR 342 (H).

In *casu* Mr *Madzedze* submitted that the applicant has a clear right. His right relates to his personal property which is locked up at the third respondent's premises. He handed a list of assets to the police which he acquired personally. Such right is enshrined in s 71 of the Constitution of Zimbabwe Amendment (No. 20) of 2013. On the other hand the counsel for the respondents submitted that the applicant's right is not *prima facie*, nor clear because he merely presented a list which anyone else could draft.

The counsel for the respondents submitted further that the parties before this court were involved in the third respondent's company. The applicant then gave back his 50% shareholding. He had been appointed a managing director in 2015 and a dispute arose on mismanagement of the third respondent company. Parties then failed to resolve the dispute and the applicant resigned and took all books of the third respondent. The first respondent with the assistance of the second respondent tried to have a forensic audit but the applicant refused. He disputed that the applicant had some assets which he can come and collect. He further submitted that the applicant had not been barred from setting foot at the third respondent's offices but conceded that he was barred from getting goods before a forensic audit is done. According to him if allowed to collect the goods the others would suffer irreparable harm.

In my view it is clear that the applicant brought some personal goods to the third respondent's company and that he has been barred from removing the same. He therefore has a clear right. The document dated 4 July 2016 clearly showed that the applicant discharged his shareholding in a company called YAGDEN ENGINEERING and not in the third respondent company called Matebeleland Engineering (Private) Limited. Even the agreement

dated 26 November 2014 talks of a different company called Hotham Enterprises and not the third defendant.

On the second requirement the applicant submitted that he feared harm in two ways. Firstly, harm against him and his family in that he was threatened to be harmed by the second respondent who claimed to be from the President's Office. He investigated such claims and found that indeed the second respondent is linked to high offices. He tendered a copy of The Herald Newspaper of Friday 17 February 2017 which clearly showed that one Mr Regis Maburutse the second respondent and one Mr Tonderai Chidawa have connections with one of the Vice Presidents of Zimbabwe. He further produced a copy of the NewsDay dated 26 July 2016 which further confirmed that Tonde and Maburutse who are members of the Zimbabwe Congress of Students Union (Zicosu) are connected to the high office of the Vice President of Zimbabwe. In my view his fears were well-grounded.

Secondly, the applicant told the court that he feared that there is irreparable harm to his property which was capable of being disposed of.

The counsel for the respondent disputed the allegations and said the applicant had failed to show that his property had been sold hence the harm complained of was not imminent. He claimed that the applicant's remedy is to engage his partners so that a forensic audit can be carried out.

I am persuaded that indeed the applicant was threatened with harm by the second respondent who claimed to be from the President's Office and that he was barred from collecting his person property from the third respondent. There is a real risk that the applicant's personal property may be disposed of by the respondent. There is there for a well – grounded apprehension of irreparable harm if the relief sought is not granted.

The balance of convenience in my view favours that the applicant be allowed to collect his personal property without any hindrance. There is no other satisfactory remedy in the circumstances. In the circumstances I will grant the relief sought per provisional order.
In the result the application is granted with costs.

Mawere Sibanda Commercial lawyers, applicant's legal practitioners
Nyika Kanengoni, respondents' legal practitioners