

HASSAM BHADELLA
versus
RIDGWAY GRANT REAL ESTATE
and
PATRICK RIDGWAY

HIGH COURT OF ZIMBAWE
DUBE J
HARARE, 15, 18, & 24 June 2021

Urgent Chamber Application

T Zhuwarara, for the applicant
W Nyakudanga, for the respondents

DUBE J:

1. This chamber application was placed before me on a certificate of urgency on 24 May 2021. I formulated the view that the application was not urgent and removed it from the roll. The applicant requested audience with the court resulting in the matter being set down for the purposes of hearing argument on the question of urgency.
2. At the hearing of the matter, the respondent challenged the authority of the court to deal with the application on the basis that the court has already made a decision on urgency and is *functus officio* on the question of urgency. The respondents submitted that the procedure adopted by the court is not in accordance with r 244 and urged it to decline to deal with the matter.
3. Section 244 of the rules provides as follows;

“244. Urgent applications

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.
Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”
4. Rule 244 empowers the court to consider an urgent chamber application on the papers when the matter is placed before it. Where the court is of the view that the application is not

urgent, it has a prerogative to decline to deal with the application on an urgent basis without having heard the parties. Where the court directs that the matter be set down, the court may invite any interested parties to make representations on the question of urgency.

5. In *Church of the Province of Central Africa v Diocesan Trustees Diocese of Harare*, 2010 (1) ZLR 346, the court dealt with the implications of an endorsement by a judge that a matter is not urgent before hearing the parties and said the following;

“The endorsement that the matter is not urgent was made on a consideration of the papers without hearing any oral arguments by the parties. It was the court’s *prima facie* view of the matter as regards the issue of urgency. The parties were not heard by the court on the merits of the issue of urgency. It is my considered view that this court cannot be *functus officio* in such circumstances. Had the parties been heard orally and a determination made thereafter, such determination would be consequent upon full ventilation by the parties on the pertinent issue. In my view the court would then become *functus officio*.”

6. These sentiments resolve the query raised by the respondent. An endorsement that a matter is not urgent made by a court without having heard the parties on the question of urgency, is a *prima facie* view of the court. Courts are in such circumstances not *functus officio* and should always lean in favour of hearing parties on the question of urgency when requested to do so. The court was not precluded from hearing the parties on request. The course taken by the court is in accordance with the practice of this court. See *Mazokera & Anor v Ndlovu & Ors* HH 427/13; *Marange Resources (Pvt) Ltd v Core Mining and Minerals (Pvt) Ltd (in Liquidation) & Ors* HH 187/13.

7. The parties addressed the court on the urgency of the matter after which the court directed the parties to address it on the merits of the application. The court undertook to determine the issue of the urgency of the application first in its judgment. If need be, the court would proceed and deal with the merits of the application.

8. The applicant averred as follows; On 18 May 2021, the applicant saw an advert in a newspaper advertising the sale of Lot 3 of Lot 4 Block A of Avondale, [hereinafter referred to as the property]. He entered into negotiations with the second respondent who is the *alter ego* of the first respondent. On 20 May 2021, the applicant sent an email to the second respondent wherein he offered to buy the property. The second respondent accepted his offer culminating in an agreement of sale. On 21 May, he learnt that the property had been sold to an unidentified third party. The applicant maintains that a valid agreement of sale was entered into when he accepted all conditions of the sale entitling him to seek an interdict stopping any further dealings in the property. He submitted that the respondents breached the contract of sale.

9. On 24 May 2021, the applicant lodged this application seeking an order temporarily interdicting the second sale and staying advertisement, sale and transfer of the property pending the return date. At the hearing, the applicant amended his draft order by consent of the respondents to reflect that he seeks to interdict the respondent from encumbering, mortgaging or transferring the property pending the return date.

10. The applicant submitted that he has established a *prima facie* right to the relief sought. He stated that the respondents have concluded a cash against transfer agreement with the third party entailing that transfer of the title in the property is imminent. He argued that he will suffer irreparable harm should the second sale be allowed to subsist and transfer is effected thus making his claim for specific performance unobtainable. He maintained that the balance of convenience favours the granting of the interim relief sought and that there is no other remedy other than an interdict that will safeguard his interests.

11. The respondents' position was that no agreement of sale was entered into between the parties entitling the respondents to sell the property to the second buyer. They submitted that the application is not urgent and that the applicant's urgency is self-created. They maintained that there was no irreparable harm likely to ensue warranting the relief sought and argued that any irreparable damage that may ensue is capable of being cured by damages.

12. On the merits, the respondents accept that the property has been sold to a third party. They submitted that the applicant has not shown a *prima facie* entitlement to stop the transfer of the property as his overtures to buy the property were not accepted. They contended that there is no irreparable harm and that the applicant has an alternative remedy in damages and the balance of convenience favoured the respondents.

13. The *locus classicus* case on urgency is *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) where CHATIKOBO J defined the concept of urgency as follows:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. 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”.

See also *Dexprint Investments (Private) Limited v Ace Property & Investment Company (Private) Limited* HH 120-02”

14. A litigant who brings a matter on a certificate of urgency must demonstrate that if the relief sought is not immediately granted, he stands to suffer irreparable harm. He must show that the matter must not wait to be dealt with on the ordinary roll. Irreparable harm is the cornerstone of temporary interdicts. An applicant must show that he has reasonable and well-

grounded apprehension of irreparable harm occurring to him. Mere possibility that irreparable harm will occur to one does not suffice. The harm must be harm which cannot be adequately addressed by an award of damages. The test for irreparable harm is an objective one.

15. An applicant wishing to bring a matter on an urgent basis must treat the matter with urgency and act when the need to act arises. The urgency must not be self- created. Urgency that stems from a deliberate and careless abstention from action is not the urgency anticipated by the rules.

16. The applicant seeks on the return date an order for specific performance and to enforce a sale of land. An order for specific performance is claimed where there is in existence a contract which has been breached, in which case the claimant seeks compliance with the terms of a contract. The remedy of specific performance aims at a party getting what he bargained for in a contract as opposed to damages for loss of the thing. The property was being sold on a “cash against transfer” basis. This entails that the moment the purchase price was received, the property would be transferred. If the property has been sold to a third party on the same terms, the property is on the verge of being transferred. The court was informed that a conveyancer is already in the process of transferring the property. The irreparable harm stems from the fact that once transfer is affected, the remedy of specific performance is removed and is no longer available. The applicant’s fears have been confirmed.

17. Land is unique in that no two pieces of land have ever been found to be precisely the same. Where a buyer fails to get specific performance because the land targeted is no longer available, an order for damages will not adequately compensate him because he can never buy the same piece of land anywhere else. Where specific performance claimed relates to land and the land is no longer available to a buyer, monetary damages cannot adequately compensate the buyer. The claim of specific performance will no longer be possible.

18. Should the applicant be successful on the return date, he will no longer be able to claim specific performance once transfer has gone through. The applicant will suffer irreparable harm. Damages are not an adequate measure to compensate the applicant for the loss of the contract in a case where the purchase price has not been paid. The objective of the application is to protect the property so that the applicant can vindicate his rights over the same property on the return date. The irreparable harm is related to the possibility of use of that particular land in the future.

19. The need to act arose at the time the applicant became aware that the land had been sold to somebody else on 21 May 2021. He filed this application on 24 May 2021. The applicant

did, within three days of being advised of the second sale, launch this application. The applicant asserted himself timeously when the need to act arose. I am not satisfied that the urgency of this application is self-created. The matter is urgent.

19. The requirements of a temporary interdict are as follows;

- a) A *prima facie* right, though open to doubt;
- b) That there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and him ultimately succeeds in establishing the right;
- c) The balance of convenience favours the granting of interim relief, and
- d) That the applicant has no other satisfactory remedy. See also *Cool v Minister of Justice* 1955 (2) SA 682 (C) at 688; *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Baodi v Baodi* 1992(2) ZLR 22 (H); *Flame Lily Invtm Co (Pvt)Ltd v Zimbabwe Salvage & Anor* 1980 ZLR 378.

20. These requirements are to be considered cumulatively. An applicant who has strong prospects of success and is able to show the existence of a clear right need not prove that he is likely to suffer irreparable harm. Where there is a *prima facie* right though open to some doubt, there is a need for him to show that the other factors favour the granting of the interdict.

21. The essential requirements for a valid contract are offer and acceptance. Acceptance of the offer must be communicated. In *Ashanti Gold Fields Ltd v Kovi* 2009 (2) ZLR 327, the court held that once a person communicates acceptance of an offer, a contract ensues. An offer may be rejected by the offeree before the offer is accepted on the basis that the terms are not agreed to or where he makes a counter offer.

22. The respondents' advertisement of the property constitutes an invitation to treat. The applicant engaged the second respondent with a view to buying the property. The following email confirms the agreement of sale. On 20 May 2021 at 7:50, the second respondent sent the following email to the applicant which read as follows;

“I can confirm that of course you have a deal in principle, however this also applies to other applicants and until you confirm an unconditional offer to purchase cash against transfer the property remains on the market”

23. There was an offer to sell the property. As of 20 May 2021, the property was still on the market. In terms of this correspondence, the applicant had a deal in principle. All he was

required to do is to confirm an unconditional offer to purchase the property cash against transfer for an agreement to be reached.

24. The language used in the respondents' email is clear. The condition set by the respondents was required to be fulfilled in the manner specified. The intention was that the applicant confirm purchasing the property cash against transfer.

25. This the applicant did. On 20 May 2021 at 12.37pm, the applicant replied as follows,
"Further to our numerous discussions, we confirm that we will buy the property at the advertised price for cash against transfer and we will become responsible to apply for the special consent from the City of Harare. It is my hope that you will confirm the deal by email today"

The applicant accepted that he would buy the property for the price advertised for cash against transfer and met all the conditions set by the respondents. The applicant confirmed an unconditional offer to purchase the property cash against transfer on the same day. It was not a condition of the agreement that the seller would be required confirm the deal after confirmation of the offer to purchase.

26. At 4pm the same date, the second respondent confirmed that he had seen the applicant's email advising of the unconditional acceptance. There was no time set for fulfilment of the condition. Communication that came on 21 May 2021, advising the applicant by email that the property had been sold to an undisclosed party, came after the applicant had already conveyed his acceptance of the respondents' offer. The second respondent acknowledged the existence of an unconditional acceptance of the offer. The moment the applicant confirmed an unconditional offer to purchase the property cash against transfer in writing, a binding contract came into effect for as long as the property was still on the market. The effect is that the property came off the market.

26. The requisites of an agreement of sale were met which include an agreement on the property to be sold, the price payable of USD \$125 000 and the modalities which include agreement that this was a cash against transfer agreement. The second respondent resold an immovable property that had already been sold to the first purchaser, the applicant. This is the position that the applicant seeks to protect. Once the condition set by the respondent was accepted, there was no longer a question of an invitation to treat. The contract became perfecta entitling the applicant to defend his rights in terms of the contract.

27. Whilst the respondents' position is that they have already sold the property, the court was not told the date and time the second sale took place. In fact, the applicant initially doubted that there is indeed a second sale. The court was not shown proof of the agreement entered

into with the third party. If there is indeed a second sale, the applicant was not advised of it before and immediately after he confirmed an unconditional offer to buy the property. As the first purchaser and a person with an interest in the property, he has the right to interdict the sellers from passing transfer to the second buyer. The applicant has shown a *prima facie* right to stop the encumberment, mortgage or transfer of the property. The applicant's *prima facie* right stems from the classical offer and acceptance principle.

28. In *Ericksen Motors (Welkom) Ltd v Protea Motors & Anor* 1973(3) SA 685 (A), the court defined balance of convenience as follows;

“ In exercising its discretion the court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience”

29. What is sought is an interdict for a short period pending the return date. If the interdict is granted the respondents are unlikely to suffer any prejudice. It is assumed that they have already received the purchase price as the property is already in the process of being transferred. Interested parties have an opportunity to oppose the application by anticipating the return date. If the interim interdict is not granted, the applicant will as already discussed, suffer irreparable harm. The balance of convenience favours the protection of loss of property on transfer until the dispute is resolved on the return date. The balance of convenience favours the granting of the interdict.

30. If the second purchaser obtains title to the property, the remedy of specific performance will no longer be available to the applicant. There is no other appropriate remedy available to the applicant. Damages will not achieve the desired effect of the relief sought. The applicant is entitled to the relief sought. In the result, the following provisional order is granted;

Pending the return date, the following provisional order is granted;

1. Pending Return Date and determination of this matter, applicant is granted the following interim relief.
 - a) The 1st and 2nd respondents are interdicted from encumbering, mortgaging and or transferring Lot 3 of Lot 4 Block A of Avondale measuring 2180 square meters.
 - b) Within 24 hours of the grant of this Provisional Order, the 2nd respondent is to notify all interested parties of this Order and their right to lodge opposing papers in anticipation of the Return Date.

- c) Any interested party shall have the right to join the proceedings and lodge their opposing papers in anticipation of the Return Date.
- d) There shall be no order as to costs.

Ngwerume Attorneys at law, applicant's legal practitioners
Nyakudanga Law Chambers, respondents' legal practitioners