MAXWELL MATSVIMBO SIBANDA
versus
GWYVE ANN STEVENSON
and
BRIAN STEVENSON
and
WINTERTONS LEGAL PRACTITIONERS
and
N.M WILSMER
and
MRS CHIMBINYU OF KANTOR & IMMERMAN
and
MINTER TRUST
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 November 2021 & 28 July 2022

**Opposed Court Application**

*O Ochieng*, for the 3rd, 4th and 6th respondents
Applicant in person

**CHITAPI J:** This application was heard on 10 November, 2021 and judgement was reserved. The applicant is a self-actor. The applicant wrote a follow up letter dated 22 February, 2022 on when judgement could be expected to be delivered. Messrs Wintertons legal practitioners per Mr *Wilssmer* had also written on behalf of the third and fourth respondents enquiring on the reserved judgement by letter dated 14 February, 2022. Messrs Mark Stonier legal practitioner on behalf of the sixth respondent and through the hand of Mr *Mark Stonier* himself wrote a follow up dated 26 April 2022. I feel constrained to pass a comment on the letter by Mr Stonier. The letter reads as follows:

26 April 2022
The Registrar
High Court of Zimbabwe
Harare

Dear Sir

*MM SIBANDA* v *GA STEVENSON & SIX OTHERS* CASE No. 3203/2018
I refer to the above case in which we are still awaiting for the judgment to be received.

We note that the 90 day period set by s 19(1) of the Judicial Service (Code of Ethics) Regulations expired on 18 February, 2022.
Can you kindly advise when, when (sec) it is expected that the judgement will be handed down

Yours faithfully
Mark Stonier
Cc (1) NM Wilsemer
(2) Registrar of Deeds

In the case of *Roysen Traders (Pvt) Ltd t/a Alliance Ginneries* v *Quton Seed Company (Pvt) Ltd* HH 12/2017. I had occasion to comment upon the right of a litigant to follow up on a reserved judgement. In that case a follow up letter had been written by the applicants' legal practitioner. After acknowledging the propriety of the letter and explaining the delay for which I expressed regret, I commented as follows on p 1 of the cyclostyled judgement.

> "…….A party to litigation before a court has a right to expect that justice be not unduly delayed and has a legitimate expectation to expect the court to hand down its judgement with reasonable promptitude and am mindful of the provisions of s 165(1)(b) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 to this effect. Follow ups on delayed judgements should be received by the judge with an open mind and not as interference into the independence of the judicial officer. I share the dicta of the Supreme Court of South Africa in *Pharmacentical Society of South African (Pty) Ltd* v *Tshabalala.* Msimang N.O; *New Clicks South Africa (Pty) Ltd* v *Minister of Health* 2005(3) SA 238 (SCA) at p 261 where the court discussed at length the judicial duty not to express irritation of displeasure where a party to a reserved judgement makes a follow up on the progress of his or her case. The judgement concluded that such follow ups or complaints are to be understood as arising from a party's frustration and disillusionment with a delay in knowing how his or her case has been disposed of. Whilst such follow ups may be construed as interference with judicial independence it was reasoned in the South African Supreme Court in the said cases that it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence on the judiciary……."

It is my view that every judge is acutely aware of the constitutional responsibilities reposed upon a judge when dispensing justice to timeously deliver judgements. This duty is one of the key constitutional duties reposed on the office. It may not be a known fact to the generality of legal practitioners,' 'litigants and the general public that reserved judgement are compiled monthly and monitored by in the case of the High Court, the Honourable Judge President. Every effort is made to ensure that the judgements are written and delivered with reasonable promptitude. The reasonable promptitude is determined by the circumstances prevailing at any given time which impact upon the judge's ability to deliver a reserved judgement. The circumstances are not capable of listing but may include the workload and the judge being involved in trials and other cases which take a number of days to complete. The

writing of a judgement is not like mathematics where a formula is applied and yields an answer. The judge has to apply his or her mind to the facts, read authorities cited and do own researches and then analyze the facts and law. In stating as above, I do not advocate for late delivery of judgements but to simply explain that it would not be in the interests of justice for the judge to deliberately delay the delivery of a reserved judgement because by delaying, new work continues to be allocated and would require actioning. It will interest the stakeholders to note that the learned Judge President and Senior judges appointed as divisional heads are very active in following up on reserved judgements with individual judges who must give explanations for delays. The learned Chief Justice occasionally gives directions that judgements outstanding for a certain period be completed by a specific date showing that the system is alive to the need to have judgements delivered timeously. It must not be forgotten that COVID 19 also affected the smooth flow of the system. In this regard I do no find it necessary to state that judges were not spared from the pandemic directly or indirectly with courts closed and judges as with many other persons having to stay away from work.

Having made the aforegoing comments on the rights of a party to litigation to expect an expeditious delivery of judgement, the acceptability of a litigant following up on a reserved judgement by making written enquiry through the registrar and bemoaning the increased case load which must be dealt with by the judges, I unfortunately did not consider that the letter by Mr *Stonier* was appropriately addressed as it may be interpreted as putting undue pressure upon the judge. By prefacing the letter with a reference to s 19 of the Judicial Code of Conduct and stating that a reserved judgement must be delivered within 90 days of reservation and then calling upon the judge to indicate when judgement shall be delivered, the impression one gets is that Mr *Stonier* made an accusation that the judge violated the Code and must be brought to account for the violation by giving a date of delivery of the judgement. Simply put, Mr *Stonier's* references may be interpreted as an indirect confrontation with the judge for the judge to purge his or her indirect or direct alleged violation of the Code. It should have been clear to Mr *Stonier* that longer periods for reserved judgements delivery are provided for in other subsections of s 19 as referred to in his letter. I however entertain doubt that Mr *Stonier* given his seniority as a legal practitioner of this Court would deliberately seek to affront or accuse a judge of impropriety by a direct letter to the judge. I must hold that he probably did not apply his mind to the fact that his noble intention to follow upon a reserved judgement would have resulted in the court making or judge making the comments which I felt constrained to make. The comments I have made are not intended to be understood as an indictment against Mr

*Stonier* nor is he called upon nor expected to defend himself. The comments are intended to advise the litigants and legal practitioners that they may have to bear with reasonable delays in the delivery of judgements because of factors beyond the judges control. That aside, I revert to the reasons for judgement.

Mr Sibanda the applicant herein seeks the following relief as set out in the draft order which he attached to the application.

**"RELIEF SOUGHT**

1. Applicant has been given First Option already to purchase the property in terms of Clause 17 and 19 of the lease agreement dated 1st April 2005 and another one dated 5 November 2006. Such First Option is in terms of the offer agreed as per paragraphs 9 – 12 of this Applicant's founding affidavit in this interdict application in which the sale was concluded.
2. The removal of caveat by 1st, 2nd, 3rd, 5th, 6th and 7th Respondents on the Title Deed is illegal, null and void.
3. The sale of property to Minter Trust on 16 October 2014 under Deed No. 4846/2014 when there is a pending matter before the Supreme Court under Case No. SC 346/14 is illegal, null and void.
4. The improvement made by Applicant gives him bonafide status over the property. The 1st to 7th Respondents shall pay Applicant damages of US$2 600.00 per month for non-use of the property from October 2014 to the date of vacation of 6th Respondent from the property.
5. The 1st to 7th Respondents are hereby ordered to transfer the property to Applicant upon Applicant's full payment of US$220 000.00 to be converted to ZWD at bank rate at the date of First Option offer agreed as per paragraphs 9 – 12 of Applicant's affidavit or as per February 2020 which is equivalent US$ to ZWD."

The applicants' narration of the facts from which he pleads his relief may be summarized as that, he was a lessee of a property called 47 Addington Lane, Ballantyne Park, Harar. He attached as annexures A and B to his founding affidavit, the copies of the written lease agreements executed between him and the lessor, Brian Stevenson who was represented by his agent L.O Neil. Annexure A was executed on 1 April 2005 whilst annexure B was executed on 1 November 2006. From the annexures aforesaid, annexure A covered the period 1 April 2005 through to 31 October 2006. Annexure B was for the period 1 November 2006 through to 31 October, 2007.

For purposes of elucidating the cause of action which will be related to in time, the applicant made specific reference to clauses 17 and 19 of both lease agreements referred to above. Clause 17 of annexure A provided had the lessee acknowledgement that he would be accountable for all repairs and maintenance of the leased property. The lessee was also charged

with the obligation…."to paint the house cottage, storeroom and servants' quarters and make good what needs repairing prior to moving in."

As regards annexure B, Clause 17 provided that the lessee acknowledged that he would be accountable for all repairs and maintenance of the leased property and that the lessee would make necessary repairs before executing annexure B. It was further provided in the same clause that the lessee would make necessary repairs before executing annexure B. It was further provided in the same clause that the lessee at "his own expense maintains' the swimming pool and pump, electric gate motor and borehole pumps along with any other electrical component on the said property."

In respect of clause 19 of both annexures A and B, they were similarly worded. Without quoting the whole of the wording therein, the clause provided that should the lessor be minded to "…..sell the property at any given time, the lessee shall be given the first option at a price agreed to between the two parties." In other words, in the event that the lessor decided to sell the leased property, the lessee would be given the right of first refusal to purchase the property at a mutually agreed price as between the parties.

The applicant averred that upon taking occupation of the property, the same was inhabitable and required massive improvements to save it from collapse. He averred that at the time of occupation, the property was on sale, it being agreed that the lessee would "start by leasing the property at the same time negotiating the sale." The applicant averred that he effected improvements on the property being influenced by the consideration that the property would one day be his. The applicant claimed to have with the consent of the lessor, effected improvements thereon. The lessee claimed that the cost of the improvements amounted to USD$210 097.08. The applicant averred that the improvements which he made gave him what he called "*bona fide* possession over the property."

The applicant continued with his narration and averred that in or about August, 2005 on a date that he did not specify the lessor offered him the option to purchase the property for the sum of USD$220 000.00 which would be converted and paid in Zimbabwe dollars. The applicant attached downloaded e-mail communications between the second respondent and the second respondents' estate agent. Pointedly there was an e-mail sent to the agent by the second respondent on 15 August 2005. The e-mail is annexure F to the applicants' founding affidavit and the subject is stated as "offer on house." The e-mail reads in material part"

> "….we are looking for 220 clear of all charges and very green. If not, we will keep it and carry on which we are doing now……."

The applicant also attached e-mails exchanged between the second respondent and the estate agent. The e-mail are dated 31 May 2006, 6 June 2006 and 12 June 2006. They are annexures F and F1. Specifically, the e-mail of 12 June 2006 referred to the sending to the lessor of a draft agreement of sale for the lessor's consideration and signature if in agreement. The applicant attached as annexure G what he called details of a conversion of United States dollars to Zimbabwe dollars. He averred that he sold his house to raise money to purchase the property in dispute.

The applicant averred that despite his acceptance of the offer made to him of the property at a price of US220 000 to be converted to Zimbabwe dollars for purposes of payment neither the first and second respondent or the agent forwarded the agreement of sale for signature despite a promise having been made that the agreement would be forwarded to the applicant within three weeks. The applicant annexed as annexures J and K being correspondence in the form of e-mails between the second respondent and his agent. In the annexure J sent on 12 July 2006, the estate agent in the email directed to the second respondent expressed regret that no agreement could be reached with the applicant on the sale of the house. The agent set out for confirmation by the second respondent, various amount in billions of dollars which would constitute the sale price of the property and other costs. The agent confirmed that the lease agreement was due to expire at the end of October 2006. Annexure K is an e-mail dated July 13 2006 again from the estate agent to the second respondent, wherein the agent advised that the applicant was apologetic to the second respondent and that the applicants' offer to purchase the property at US$220 000 still stood should the second respondent wish to reconsider that offer. The applicant then stated in relation to annexures J and K that the annexures signified improvements which the applicant made on the property. However, upon perusal, I noted that the annexures do not relate to any improvements. The applicant averred that his legal practitioners Kantor and Immerman requested the seventh respondent to place an XN caveat on the property by letter dated 25 April 2007. Notwithstanding the caveat the applicant averred that the property was still transferred to the sixth respondent after the removal of the caveat by Kantor Immerman. The applicant cited a Mrs Chimbumu of Kantor and Immerman as the third respondent. He averred that she was the one who removed the XN caveat without the knowledge of the applicant. I should mention that an XN caveat does not bar transfer of a property on which at is noted per se. It is a flag which indicates that there is a dispute on the property. A person wishing to bar transfer of a property should apply for an appropriate interdict to the court. The practice is that should a

property on which an XN caveat has been noted be subject of transfer, the seventh respondent will notify the party who placed the XN caveat about the impending transfer after which transfer will be affected if there is no court order to stop it.

In relation to alleged wrongful conduct against him by the fifth respondent or Kantor and Immerman, the applicant averred that the XN caveat was for purposes of ensuring that the property in dispute should not be transferred to any other person but him. Applicant averred that his legal practitioner at Kantor and Immerman was Mrs Zindi who left the matter to be handled by Ms Chakasikwa who renounced agency in November 2007. The applicant averred that on 22 February 2016 he then upon checking with the seventh respondents' offices discovered that the property had been transferred to the sixth responded under deed of transfer dated 16 October 2014 No. 4846/14. The applicant averred that the transfer was done without his knowledge upon instructions given by the first to seventh respondent. He contended that the transfer was done illegally and was therefore null and void.

Applicant further averred that he believed that the caveat was still intact and valid. He contended that he had a pending appeal under case No. SC 346/14 which concerned an interdict. He did not give details of the appeal nor how it affects the application. A perusal of the notice of appeal shows that the applicant noted an appeal against the judgment of DUBE J (as then she was) HH 311/14. In that case, the applicant was seeking to interdict the first and second respondents from selling and transferring the disputed property herein. DUBE J dismissed that application hence the appeal referred to. The applicant then averred that the sixth respondent took transfer of the property in the face of the pending appeal and that the sale of the property to the sixth respondent was null and void. I must note that the judgement of DUBE J was to refuse to grant the interdict prayed for. The appeal was against her decision to refuse to grant the interdict. The suspension of the judgement aforesaid pending appeal left the parties in the same position they were before the judgement aforesaid. The position was that there was nothing to stop the sale and transfer of the property which is why the applicant was seeking an interdict to stop the sale and transfer in the first place.

The third and fourth respondents opposed the application. It is important to note that in so far as the reasons for citing the third and fourth respondents are concerned, the applicant in the founding affidavit stated as follows in para(s) 4 and 5 thereof:

> "4. The 3rd respondent is a law firm who is accused of having a direct interest in the matter whose address for service is Wintertons Legal Practitioners Beverley Corner, 11 Selous Avenue, Harare.

> 5. The 4th respondent is Mr N M Wilsemer a lawyer who is practising at Wintertons legal practitioners whose address for service is Wintertons Legal Practitioners Beverley Corner, 11 Selous Avenue, Harare. The fourth respondent deposed to the third and fourth respondents' opposing affidavit. He correctly noted that there was no need to cite him or the third respondent because no cause of action was alleged against them nor was any relief sought from there. Significantly though, the fourth respondent averred that the applicant had wrongly alleged that the address for service of the first and second respondents was that of the third respondent. The fourth respondent deposed that the third respondent did not have authority to accept service of process intended for the first and second respondents. The applicant did not persist that service of process intended for the first and second respondents could lawfully be served upon the third respondent. The applicant equally did not persist nor motivate any cause of action nor claim any relief against the third and fourth respondents."

Simply put, a cause of action consists in facts which give rise to an actionable wrong committed by the defendant against the Plaintiff. The Plaintiff must allege and prove all the elements which constitute the wrong and the liability of the defendant there on. The enquiry on whether a cause of action has been established is one of both fact and law. The facts connote establishing what happened. The further fact would be to connect the defendant to the facts alleged. The law is whether an actionable wrong arises from the facts as well as the defendant's labiality on the wrongs so established. To the extent that the applicant did not establish a cause of action against the third and fourth respondents, the matter ends there. The court does not need to delve into the merits of the dispute because there are no merits to be determined *vis –a vis* the third and fourth respondents.

In relation to the first and second respondents, the applicant failed to prove that they were properly served at all. The fourth respondent averred that the third respondent was not the address for service for the first and second respondents. Mr *Ochieng* submitted that it was a fact known to the applicant that the first and second respondents were based in Sudan. The applicant did not seek to apply for service of the application upon the first and second respondents by edictal citation. The fifth respondent was said to be deceased. Again, the applicant took no steps if he was intent to pursue the case against the fifth respondent to join her estate. It follows that without service having been validly made against the first and second respondents there was no basis to determine the matter against them. The matter ends there as much as it also ends in regard to the fifth respondent for the undisputed reason of her demise and the estate not being joined.

Mr *Ochieng* also made submissions in relation to the sixth respondent. The sixth respondent is the current registered owner of the properly in dispute. Mr *Ochieng* submitted by objecting to the filing by the applicant of a supplementary answering affidavit. The objection has merit. The applicant did not first seek leave to file the additional affidavit as is

required by law. It is trite that in applications proceedings there are three sets of affidavits provided for namely the founding affidavit, opposing affidavit, replying affidavit. Any additional affidavits may be filed on leave being granted upon application to file further affidavits. The supplementary answering affidavit is expunged from the record. The applicants' submission that the affidavit be allowed because it will assist the court to clear issues does not cure the hurdle that there is no automatic filing of the same since leave must be sought first and granted. The argument that the affidavit concerned will assist the court in the resolution of the dispute, is an argument which is raised in the first instance in an application for leave to file the additional affidavit. The applicants' submission therefore was made out of place.

The applicant in his founding affidavit averred that the transfer of the property to the sixth respondent was null and void because there was a caveat on the property when it was transferred. Further the applicant averred that the property was transferred in the face of an interdict granted by the Supreme Court in case No SC 346/14 dated 16 July 2016 which was still pending. The submission that there is a pending Supreme Court appeal No Sc 346/14 was incorrect. The record shows that appeal No. SC 346/14 was withdrawn by the applicants' legal practitioners. Messrs Matsikidze and Mucheche on 16 June 2016. The applicant proferred ignorance of the notice of withdrawal. He did not dispute its validity. That put paid to the applicant's contention that the transfer of the property to the sixth respondent was null and void for the reason of an interdict being placed thereon by reason of the pending appeal SC 346/14.

In relation to the caveat placed by the applicants then legal practitioners which was purportedly uplifted by the fifth respondent the facts are that the caveat was uplifted and there was no impediment to transfer. The upliftment was not done by the sixth respondent nor upon the sixth respondents' instigation. The applicant has again failed to establish a cause of action against the sixth respondent. The applicant did not dispute the sixth respondents' averments that it took transfer of the property upon satisfying all the steps which should be taken by a purchaser who intends to have a property registered in his or her name.

To wrap up this judgment there was no agreement of sale or otherwise between the applicant and the third, fourth and sixth respondents. The relationship which the applicant had was between him and the first and second respondents who are not party to this suit by reason of non-service of the application upon them. Without the first and second respondents being players in this application the applicant cannot succeed in obtaining the relief which he seeks. The applicant took a long shot in having this application proceed in the face of the non-service

of application and the resultant non-participation of those respondents. The application was doomed to predictable failure from the failure to serve the first and second respondents.

The third respondent has in the opposing affidavit set out the long and arduous route which the matter took and that it continues to be in the courts on account of the alleged belligerance of the applicant who continues to being the same dispute yet the dispute was resolved. It seems to me that it is not necessary to plough through the agony of unravelling the paper trail. To do so would have been advised had the first and second respondents been party to the litigation. In this application, the real dispute has been and continues to be between the applicant and the first and second respondents. The applicant and the second and third respondents were the parties to the now notorious lease agreement which gave the applicant the option to purchase the property in the event that the lessor was minded to sell it. As against the respondent who participated in this application, no case was made against them for the relief sought or alternative relief. The application must fail.

The remaining issue pertains to costs. The third, fourth, sixth pray for costs on the punitive scale of legal practitioner and client. I am minded to grant the costs at that scale. The said respondents have been unnecessarily dragged to court when there was no cause of action established by the applicant against them. No relief is sought against them save for the sixth respondent who would have its deed cancelled were the applicant were to succeed. However, no case of wrongdoing was established against all participating respondents. It was clear and should have been so to the applicant that it was an exercise in futility to proceed with the application without the participation of the first and second respondents. This litigation was just entered into as against the third, fourth and sixth respondent without care and thought on the predictable failure of the application. In such an instance there is no justifiable reason to deny the third, fourth and sixth respondents their costs on the scale claimed as they must be fully compensated for their costs.

Consequently, the following order is made

1. The application be and is hereby dismissed with costs of the third, fourth and sixth respondents to be paid by the applicant on the scale of legal practitioner and client.

*Winterlous*, third and fourth respondent's legal practitioners
*Mark Stonier*, sixth respondent's legal practitioners