MATHIAS MADZIVANZIRA
and
MILDRED MADZIVANZIRA
and
LORRAINE MPOFU
versus
DEXPRINT INVESTMENT (PRIVATE) LIMITED
and
GEORGE CHIKUMBIRIKE

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 20 and 28 August 2002

Urgent Application

Mr *D. Pundu,* for the applicants
Mr *G. Chikumbirike,* for the respondents

NDOU J: Applicants seek a provisional order in the following terms:-

"Terms of Order Made

That you show cause to the Honourable Court why a final order should not be made in the following terms:-

1(a) That the 2nd Respondent be ordered to release ten million five hundred thousand dollars ($1 500 000.00), being the funds deposited into his Trust Account by the applicants, together with the accrued trust account interest amounts calculated from the date the principles (sic) amounts were deposited, pending the final hearing of Court Application HC No. 6572/02 noted by Applicants.

(b) The costs of suit shall be borne by the respondents.

2. Interim Relief Granted

Pending the determination of this matter the Applicant is (*sic*) granted the following relief:

(a) The 2nd Respondent be and is hereby ordered and directed forthwith to release to the Applicant's legal practitioners, the sum of ten million five hundred thousand dollars ($10 500 000,00) (the amount) together with all accrued trust account interest amounts, calculated from the date of principle amounts were deposited (*sic*).

Alternatively

(b) The 2nd Respondent be and is hereby ordered and directed to release forthwith the amount, together with all the accrued Trust Account interests amounts, calculated from the date the principle amount was

deposited, into the Trust Account of an independent law firm or the Law Society of Zimbabwe.

3. Service of Provisional Order

Service of this application or Court Order shall be effected through the applicants' legal practitioners."

The applicants' legal practitioner certified the application as being urgent.

I propose to firstly determine whether the matter is urgent. Once I am satisfied that the matter is urgent I will then consider whether the applicants have established a *prima facie* case on a balance of probability.

Urgency

The applicants have attached a recently cyclostyled judgment of Paradza J to prove a different point. In this judgment Paradza J also dealt with the question of urgency – see *Dexprint Investments (Pvt) Ltd vs Ace Property and Investments Company (Pvt) Ltd*. HH 120/2002. In pages 2 and 3 the learned judge states as follows:-

"For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt immediately irreparable prejudice will result, the court can be inclined to deal with that on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis. I am fortified in my view by the remarks of CHATIKOBO J in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 at p 193. The learned judge had this to say:-

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. … 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 arrives, the matter cannot wait. Urgency which sterms from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay."

The reason why this argument must be strictly adhered to is obvious. Matters that come before the courts are without doubt dealing with prejudice or

> potential prejudice to the plaintiff or applicant in one way or another. In asking that a matter be dealt with on an urgent basis one does not over emphasize the aspect of prejudice. What is most important to me is whether the matter can or cannot wait. If the matter can wait, there is no justification in hearing that matter as urgent. To do so will result in that matter unfairly jumping the queue of other matters that are waiting to be heard by the courts."

I would add that if the application is one that cannot wait, then that opinion must be brought home to the court, not as an opinion but as a matter of fact. The affidavit must establish that the applicant will suffer some form of prejudice or harm, and probably irreparable at that, if relief is not afforded him *instanter*. As rightly emphasised by the learned judges in the above cases, the element of harm should not be confused with urgency – *Power N.O. v Bieber* 1955 (1) SA 490 (W).

The salient facts of this case can be summarised in the following manner. On 10 January 2002 the applicants entered into agreements of sale with the first respondent, in terms of which the applicants purported to purchase certain pieces of land being the proposed sub-divisions of the remainder of Lot H of Borrowdale Estate situate in the District of Salisbury measuring 89,2623 hectares, otherwise known as Herons Gill Farm. The applicants have paid the purchase price of $10 500 00,00. This amount is being held in the Trust of the second respondent's legal practice. This application seeks to have this amount (with interest) to either be returned to the applicants or alternatively into a trust account of "an independent firm or the Law Society of Zimbabwe" pending litigation that has already been instituted in this court in case number HC 6572/02. A preliminary point that I observe, which was not raised by the respondents, is that there are no affidavits from second and third applicants supporting or agreeing with what first applicant averred in his founding affidavit. In the circumstances, it is doubtful whether the second and third applicants are properly before me. I will return to this matter only if I find that the matter is urgent. Coming back to the question of urgency, the applicants indicate that in February 2002 they became aware that the property they purported to purchase from first respondent was in fact under title of a company known as Carey Farm (Private) Limited. The applicants' papers do not show when the purchase price was paid but I can discern that it was well after they became aware that the property belonged to Carey Farm (Private) Limited. I say so because the first applicant says the purchase price was financed through an overdraft facility granted by First

Banking Corporation. Annexure "M" reveals that the facility was only approved on 20 May 2002. The applicants filed an aborted Urgent Application on 14 August 2002. They withdrew it on 15 August 2002. In that application the applicants are in the same order they appear in this application. The first respondent in that matter is also cited as such in this application. In that application Carey Farm (Private) Limited was cited as second respondent and a Madzika as the third respondent and the Registrar of Deeds as fourth respondent. The present second respondent was not cited. The relief sought in aborted application was to, *inter alia,* compel Carey Farm (Private) Limited to apply for sub-divisional title and consequently transfer the property to the applicants. Those claims were obviously not legally sustainable because the cause of action was based on agreement for the change of ownership of the unsubdivided portion of a stand without a permit to subdivide – see section 39 and 40 of the Regional, Town and Country Planning Act [*Chapter 29:12*]; *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 and *Merjury Kanduru v Charles Masimba Chihumbiri and Anor* HH 53/2002. The application was launched in its current form on 19 August 2002.

The applicants must have suspected some problems with the agreement in February 2002 when they became aware that the title was being held by Carey Farm (Private) Limited and not the first respondent. They did not act to verify the position. They paid the purchase price after May 2000. The question of urgency is dealt with briefly both in the certificate of urgency and the first applicant's founding affidavit. In the certificate of urgency it is captured in the following terms –

> "7. Finally I submit that this matter is urgent in so far as the applicants secured the funds in this matter on overdraft facility. Interest continue to accumulate and surely the applicants are entitled to an relief."

It seems to me that the question being highlighted herein is one of prejudice. This averment does say why the matter cannot wait. In any event the amount has all along been accumulating interest from May (or whatever date the loan was advanced to the applicants). The applicants have not established what has changed. In any event even if I grant the main or the alternative relief sought interest will not stop to accrue. The applicants have not explained the abstention from action from February 2002 to August 2002. The so-called "defeaning silence" which allegedly prompted the applicants to launch this application was in existence all along. The applicants have failed to establish that the matter is urgent. The application was characterised

by allegations of potential prejudice to be suffered. There are several averments on the fear that the money will disappear from second respondent's Trust Account. Moneys in the Trust Account of a law firm are held in trust and there is nothing to show any change of circumstances necessitating the need to urgently remove the money from one trust account to another. The founding affidavit of the first applicant is characterised by opinions and not matters of fact on the question of potential prejudice. It appears that generous legal advice proferred by legal practitioner representing Carey Farm (Private) Limited in the aborted first Urgent Application prompted the launching of this urgent application. This does not necessarily make the application urgent. I do not think it is necessary for me to deal with merits of the application.

I accordingly make the following order.

1. This application is not urgent.
2. There is no order as to costs.

Madzivanzira & Partner, applicants' legal practitioners.

Chikumbirike & Associates, respondents' legal practitioners.