AUTOBAND INVESTMENTS (PVT) LTD
t/a TRAUMA CENTRE
and
STREAMSLEIGH INVESTMENTS (PRIVATE)
LIMITED
and
DR VIVEK SOLANKI
versus
AFRICAN MEDICAL INVESTMENTS Plc
and
THE SHERIFF, HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 & 29 September 2014

Urgent Chamber Application

J.S Samukange, for the applicants
Adv. *A.P. de Bourbon,* for the 1st respondent

MANGOTA J: The litigation history which pertains to the present application involves three legal entities and one natural person. The entities in question comprise:

(i) Autoband Investments (Pvt) Limited t/a Trauma Centre - First Applicant

(ii) Streamsleigh Investments (Private) Limited - Second Applicant

And

(iii) African Medical Investments Plc - First Respondent

Dr. Vivek Solanki who was cited as the third applicant is the natural person who deposed to the affidavit of the second applicant.

From the papers which are filed of record as read with other matters which the parties filed in this court as well as in other courts, it is evident that the parties' litigation commenced in the year 2011, if not earlier. In case number MC 16435/11 which was heard and concluded in the Magistrates Court, Harare on 11 October 2011, the first applicant successfully prayed for the eviction of the first respondent from premises known as stand number 2924 Salisbury Township of Salisbury Township Lands which are situated at number 15 Lanark Road, Belgravia, Harare (the property). Following its success in the mentioned regard, the first

applicant applied, once again successfully, for leave to execute on the order which it had obtained.

The second applicant which was not a party to the proceedings in the Magistrates' Court case number MC 16435/11 filed an urgent chamber application with this court. It did so under case number HC 10126/11. It sought from this court a declaration which was to the effect that:

> "1. The eviction order granted by the Magistrates' Court, Harare in the matter between *Autoband Investments (Private) Limited t/a Trauma Centre* v *African Medical Investments Plc* under case number MC16435/11 be and is hereby declared to be of no force, effect or application as against applicant,
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> 2. The respondent be and is hereby banned and interdicted from evicting or in any other way interfering with the applicants' agents, employees, occupation and possession of the premises known as stand number 2924 Salisbury Township of Salisbury Township Lands situated at number 15 Lanark Road, Belgravia Harare utilising the eviction order granted in case number MC 16435/11.
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> 3. The respondent pays costs of this application *de bonis propriis* or an attorney client scale".

The court read the judgment which pertained to the abovementioned application. It, however, could not find the basis which persuaded the court which heard the application in allowing a party which was not joined to the proceedings which had taken place in the Magistrates' Court to file an application with it of a matter which was substantially on all fours with the one which the Magistrates' Court, Harare, had heard and determined. The court noted that both parties in the application were represented by very able counsel each of which was instructed by a very competent team of legal practitioners. Counsel on either side of the divide, it is evident, did a lot of justice as well as persuasive arguments to their respective cases with the result that the court allowed the parties to remain and appear before it as they had been cited. The court which heard the matter dismissed the application which it said was motivated by nothing other than the (second) applicant's desire to procedurally and unfairly interfere with a legitimate lower court process. It was the court's view that the application was an attempt by the (second) applicant to undermine the authority of the lower court.

Following the decision of the court in case number HC 10126/11, the first respondent as well as its officials and all those who claimed occupation through them were evicted from the property.

The second applicant *in casu* remained dissatisfied with the decision of the High Court. It, accordingly, filed an appeal with the Supreme Court against that decision. Three judges of that court heard the appeal which had been filed under case number SC 43/14. The Supreme Court upheld the appellant's appeal and awarded the latter its costs on a higher scale.

Armed with the order which it had obtained from the highest court on the land, the appellant filed an application with the Supreme Court. It applied that it be granted leave to execute. It filed its application under case number SC 72/14. The respondent which is the first applicant *in casu* appealed to the Constitutional Court against the Supreme Court decision. That appeal is pending before the Constitutional Court. The Supreme Court which heard the appellant's application to execute granted the application the respondent's filing of an appeal to the Constitution Court notwithstanding.

The abovementioned developments triggered the present application. In the application, the applicants prayed that the first respondent be interdicted from evicting the first applicant from No. 15 Lanark Road, Belgravia, Harare. The deponent to the applicants' affidavit, Dr Solanki, stated that he was the Chief Executive Officer, Managing Director and Major shareholder of the first applicant and that he was, as such, authorised to act on behalf of the first applicant. He said the second applicant was his company which he formed for the sole purpose of owning the premises at 15 Lanark Road, Belgravia, Harare. He attached to the application Annexure A which he said was a company resolution which authorised him to act for, and on behalf of, the second applicant. He gave, in a chronological order, the history which he said led him to operate from No 15 Lanark Road Belgravia, Harare and eventually form the second applicant which he allowed to own the property. He attached to the application a number of Annexures which he said supported his statement under oath as to the history of the property and the manner in which it changed hands from its previous owners todate. He remained at great pains to persuade the court to acknowledge the prejudice which he said would visit him if the application was refused.

The first respondent put up a very stiff opposition to the application. It raised a number of preliminary matters after which it proceeded to deal with the substance of the application. It, unlike the applicants which, as it were, suppressed information which was vital to the determination of this matter, appraised the court of the fact that what was placed before it had already been dealt with by the Supreme Court. It attached to its opposing papers

Annexures G and L. The Annexures are Supreme Court judgments in which the matters which substantially pertain to the present application were conclusively dealt with.

Three issues call for determination by this court. These are:-

(i) whether, or not, the present application is urgent, and if it is

(ii) whether, or not, the applicants treated it with the urgency which it deserved – and more importantly

(iv) whether, or not, in light of the Supreme Court decisions filed under case number SC 43/14 and SC 72/14, the applicants had any justification to place the present application before the court.

The court mentions in passing that the parties which the Supreme Court heard in the abovementioned two cases were the first, and the second, applicants *in casu*. The first respondent was not a party to those proceedings. It was not joined to such and it remains completely divorced from that litigation. The applicants could not justify, or profer any plausible reason, as to the fact of why a party which was not before the court which ordered that execution takes place against one of them should be interdicted from evicting the first applicant from the property. The first respondent which was improperly cited in this matter poses no threat at all, real or imagined, to the interests of the first applicant. This fact alone persuaded the court to go along with the view that the application is not urgent because, if it was, the applicants would not have taken the court on a wild goose chase as they did in the instant case. They would have been more serious than what they did and would, in the circumstances of the case, have invited the court to deal with the real issue as opposed to the imagined issue which they placed before it (emphasis added).

Ex facie the record, the applicants treated their application, which was misplaced though, with some urgency. The Supreme Court delivered the judgment on the basis of which the application was filed on urgency on 23 September, 2014. The applicants filed their present application on the same day.

The applicants, in the court's view, were not justified to bring the present application before it. The Supreme Court had spoken in clear and unambiguous language on the matter which pertained to the eviction of the first applicant by the second applicant. They were clear in their minds that this court did not, and does not, in terms of the law, have the power to undo what the Supreme Court had conclusively determined. They, for reasons best known to themselves, proceeded to file the present application. They advanced no reason for what they did save to say the court had inherent jurisdiction to hear the matter. They remained mute on

the fact of why they did not see it fit to file their application with the Supreme Court which had determined and ordered that execution takes place their filing of the notice of appeal to the Constitutional Court notwithstanding. The second applicant who was the appellant in case number SC 43/14 and applicant in case number SC 72/14 applied for leave to execute and the court granted it the leave which it sought. What the applicants did in the instant case was on all fours with what the applicants themselves accused the appellant/applicant in case number HC 10126/11. The applicants went forum shopping and such practice should be censured in the extreme sense of the word.

The certificate of urgency which Mr *Ticharwa Garabga* of Messrs Garabga, Ncube and Partners prepared and signed as part of the applicants' application reads, in part, as follows:-

> "3 when the aforesaid matter was heard, the court was not privy to certain facts which resulted in the third applicant initiating case No. HC 4632/12 in this Honourable Court, …." (emphasis added).

The facts to which the court was not privy were not mentioned by him. However, even if such facts existed, nothing prevented the applicants from applying to the court which had heard and determined the matter with a view to placing those "certain facts" before it for its reconsideration of the same.

The court remained alive to the fact that the order which was intended to be executed emanated from the Supreme Court. It was its considered view that, as it was seized with the present application, due process of law should be allowed to continue in an unhindered manner. It, accordingly, placed a temporary interdict on the execution of the Supreme Court order pending its determination of the application which the parties had placed before it.

The court is thoroughly indebted to legal practitioners who appeared on either side of this matter. Their arguments which were extremely persuasive and the authorities which each side of the divide cited enriched its mind in a very appreciable manner. The applicants must, however, take the blame for the manner in which they handled their case. They knew that what they were doing was a legal impossibility and they, all the same, proceeded to act in the manner which they did. The court will, accordingly, censure them for their unwholesome conduct.

The court has considered all the circumstances of this case. It is satisfied that, on the basis of the reasons which are contained in this judgment, the application cannot succeed. In the result, it is ordered as follows:-

1. That the application be, and is hereby, dismissed
2. That the applicants pay the costs of this application on the scale of legal practitioner and client.

Venturas & Samukange, applicants' legal practitioners
Mtetwa & Nyambirai, 1st respondent's legal practitioners