PRINCE NYEMBA
versus
UBM P AND L (PVT)) LTD
and
P AND L HARDWARE (PTY) LTD
and
THE ZIMBABWE CONLOMERATE (PTY) LTD
and
UNITED BUILDERS MERCHANTS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 3, 4, 5 and 25 November 2014

Urgent Chamber Application

T. Zhuwarara, for the applicant
Ms *E. Mahere,* for the 1st respondent

BHUNU J: This matter first came before me on 30 October 2014 whereupon after perusing the documents I formed the opinion that the matter was not urgent. Counsel for the applicant aggrieved by my initial observation requested that the matter be set down for argument on the question of urgency. I agreed and set down the matter for hearing the following day the 4th of November 2014. At that hearing Ms *Mahere* pointed out that although the applicant had cited the second and third respondents as parties to the application he had omitted to serve them with notices of the hearing.

It was conceded that the second and third respondents were not served with notices of the hearing in terms of the rules. Counsel for the applicant however submitted from the bar that the court should dispense with the need to serve notices on the two respondents because the matter is urgent. Serving them with notices in South Africa would be a waste of time and dilatory.

After hearing argument I overruled Mr *Zhuwarara*'s argument and declined to hear the matter without the second and third respondents being served with notices of the urgent chamber application. In declining to hear the matter in the absence of notice to the two respondents I gave a concise off the cuff ruling on 5 November 2014 in the following terms:

> "The right to be heard is a fundamental right enshrined in section 69 of the constitution that entitles every person to a fair hearing before an independent and impartial court.
> While our law permits *exparte* applications in exceptional circumstances, the onus is on the applicant to lay the basis for such an extraordinary procedure to be adopted by the court. In this case the Applicant has laid no basis or evidence before the court to justify depriving the two respondents of their right to be heard. It is trite that the courts lean in favour of the enjoyment of rights rather than their extinction. The *audi alteram partem* rule, that is to say, the need to hear both sides before making a judicial determination affecting the rights of litigants is the foundation upon which our justice system firmly rests."

Despite the applicant having previously sought to evade serving the two litigants with notices of hearing as required by law, upon delivery of the above ruling the applicant's legal practitioners were able to effect service the following day 6 November 2014 through the Sheriff. The matter was then set down for hearing on 10 November 2014. Unfortunately by that date the relief that the applicant was seeking had already been overtaken by events as the meeting that the applicant sought to prevent through this application had already taken place on 7 November 2014.

Rule 44 requires a party to obtain leave of the court before effecting service of process beyond the territorial jurisdiction of the court. In this case the applicant in its haste to effect service on the second and third respondents served process on the two respondents in South Africa without first obtaining leave of the court in terms of r 44. Thus at the resumed hearing on 10 November Ms *Mahere* objected to the service arguing that the service effected on the respondents was defective for want of compliance with r 44.

In the ordinary run of things defective service is no service at all. The circumstances of this case are however somewhat unique in that the applicant was prompted to effect service in a foreign territory by the court in circumstances where he was reluctant to do so. In other words, the applicant effected service on the two respondents in South Africa at the court's behest. For that reason the applicant did so with the tacit approval of this court. He must therefore be deemed to have effected service with the leave of this court. I accordingly hold that the service on the second and third respondents was proper and regular.

Ms *Mahere*, however persisted with her argument that the matter is not urgent. The applicant's deliberate failure to comply with the rules caused unnecessary delay with the result that the relief that he sought to obtain has been rendered nugatory. The meeting that he sought to avert has now been held and the resolution he dreaded passed. That objection

prompted Mr. *Zhuwarara* to make an impromptu application to amend the interim relief sought so that it suspends the resolution passed on 7 November 2014.

Mr. *Zhuwarara* however found himself confronted by some considerable difficulty in that the resolution he wants suspended is not part of the papers before the court. It is not conceivable that the court will suspend a resolution which has not been placed before it.

What prompted the applicant to file this urgent application is mainly his fear of removal as director of the first respondent. A perusal of the papers as pointed out by Ms *Mahere* shows that the problem has been simmering for at least 6 months with the applicant taking a back seat and deliberately failing to take effective action to protect his rights. In a letter addressed to the Chairman of the respondent dated 17 July 2014 he states that the decision to relieve him of his position of managing director was taken way back In May 2014. The relevant portion of his letter reads.

> "You will recall that sometime in May 2014 the board took a decision to relieve me of my position as Managing director…
> To my surprise, the board then took another decision that Mr. E Prinsloo will act in my stead as managing director, true to this decision and to date, Mr. Prinsloo has virtually taken over all the functions associated with my job. I have been side-lined. To make matters worse, about a month ago I found out that I had been locked out of my office and I don't have access even as I speak. I wrote to you on two occasions expressing my plight and you only responded once by referring to board resolutions. In our meeting of yesterday you indicated to me that this was done for 'security reasons without further elaborating what this means."

In his letter the applicant makes it clear that the question of his removal from his directorship of the first respondent is not a recent issue but a problem he has been nursing since May. It is clear from the papers that the dispute has always been about the applicant's removal from both posts of managing director and director of the first respondent. The need to act therefore arose in May 2014 when he was locked out of office and Mr Prinsloo appointed to take over his job and yet for 5 months he sat on his laurels doing nothing to remedy the situation and assert his rights. It is therefore self-evident that the applicant did not himself treat the matter as urgent until he was confronted with the date of reckoning with the result that the remedy he is seeking has now been overtaken by events. His failure to comply with the basic requirements of the law in initially setting down the matter without notifying other parties to the dispute compounded the inordinate delay in bringing up the matter for hearing before me.

It is now settled law that for the court to treat the matter as urgent the applicant must himself have treated the matter as urgent. See *Madzivanzira and others* v *Dexprint*

Investments (Pvt) Ltd 2002 (2) ZLR 316 (H). The applicant cannot expect others to treat the matter as urgent in circumstances where he has failed to do the same.

I accordingly hold that the matter not urgent.

Chambati, Mataka & Makonese Attorneys at Law, applicant's legal practitioners
Scanlen and Holderness Attorneys at Law, respondent's legal practitioners