NETONE CELLULAR (PRIVATE) LIMITED
versus
FORMULA TELECOM SOLUTIONS LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 16 & 21 October 2019

***Exparte* urgent chamber application**

N. Moyo with *T Chiurayi*, for the applicant

MANZUNZU J: This is *an exparte* chamber application which was filed on an urgent basis. The applicant seeks an order in the following terms:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in the following terms-
> 1. The memorandum of agreement entered by the applicant and the respondent in December 2016 in terms of which the respondent was to install a billing system for applicant be and is hereby declared unlawful and *void ab initio* owing to non-compliance with the provisions of the laws of Zimbabwe.
>
> INTERIM RELIEF GRANTED
> Pending the determination of this matter the applicant is granted the following relief-
> 1. The arbitration proceedings between the applicant and the respondent due to conclude with a hearing scheduled for the 23rd and 24th of October 2019 before the London Courts of International Arbitration be and is hereby stayed.
> 2. Respondent be and is hereby interdicted from applying for any other hearing dates to conclude the arbitration proceedings until this matter is finalised."

Two preliminary issues emerge in this application; (a) whether it can proceed *ex parte* and (b) whether the application is urgent.

After hearing counsels for the applicant on the 16th October 2019 I struck off this matter from the roll of urgent matters on the basis that there was no justification for the matter to proceed *ex parte* and further that in my view, it was inappropriate for the applicant to seek a declaratur, in the manner it did, within an urgent application. Otherwise I found that the matter was not urgent.

In introducing this application in paragraph 2 of the founding affidavit the deponent states that;

> "2. This is *ex parte* application for a declaratur that an agreement signed by the parties contrary to the preconditions stipulated by the State Procurement Board and in the absence of mandatory Exchange Control regulatory authorisations was unlawful and void *ab initio*."

On why the matter must proceed *ex parte* the applicant states in paragraph 5 that:

> "This application is filed *ex-parte* on an urgent basis because it is not possible to serve the application on the Respondent in the space of a few days. Respondent will suffer no prejudice as a result of the *ex-parte* nature of the application."

In terms of Rule 242 all chamber applications must be served on the respondent unless the case falls within certain exceptions laid down in that rule.

Rule 242 reads:

"(1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following –

(a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;
(b) that the order sought is –
(i) a request for directions; or
(ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or
(c) that there is a risk of perverse conduct in that any person who could otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;
(d) that the matter is so urgent and the risk or irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;
(e) that there is any other reason, acceptable to the judge, why such notice should not be given.

(1) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1)-
(a) He shall set out the grounds for his belief fully in his affidavit; and
(b) Unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1)."

This rule is clear as to when a matter can proceed *exparte*. The applicant relied on

paragraph (d) of the Rule 242 in justifying the *exparte* approach. The hearing before arbitration in London is on 23 and 24 October 2019. The certificate of urgency says applicant has no means to attend the hearing. What is not clear from the papers is when did the applicant know of these dates of 23 and 24 October 2019. What is clear though from the previous arbitration directions is that such dates were inevitable. Paragraph 24 of Direction 2 filed as annexure G says "there shall be one or more hearings."

Submissions by *Ms N Moyo* and Mr *T Chiurayi* who appeared for the applicant were not convincing as to why this matter must proceed *ex parte* and moreso on an urgent basis. They could not cite a single authority to support their argument even when they were asked to do so. They were more concerned with the applicant's inability to attend arbitration in London and that the agreement between the parties was unlawful and void *ab initio*. That may be so but no court has as yet declared so. When I asked *Ms Moyo* as to when applicant became aware of the position that the agreement was unlawful, her response was that as far back as 2017 and that the parties have all along engaged each other but without a resolution. I queried why the issue of the declaratur being brought in October 2019 and more so on an urgent basis. It was then argued that it was because of the set down dates of 23 and 24 October 2019. No irreparable harm was shown by the applicant if the matter did not proceed on an urgent basis apart from the difficulties applicant will face in attending the arbitration.

In my view there is no justification why a declaratur should come in an urgent application when the time to act arose some years back. Had the applicant filed separate proceedings for a declaratur, with such proceedings pending before this court at the time the respondent caused the arbitrator to set down the arbitration proceedings, then this application would have been appropriate to stop the arbitration proceedings pending the determination of the declaratory order proceedings.

This matter is not urgent and has no legal basis to proceed *exparte*. The application has been filed for the sole purpose to avoid attending the arbitration proceedings by the applicant. Such proceedings is in terms of the existing agreement between the parties, in particular clause 19 of the agreement filed as annexure B.

The fact that the "applicant does not have the means to attend the hearing," does not on its on make this application urgent neither is it a justification to proceed *exparte.*

For these reasons, I struck the application off the roll of urgent matters.

Coghlan, Welsh & Guest, applicant's legal practitioners