

SOVEREIGN EMPOWERMENT
CENTRE – TUTORIAL TRUST
versus
OLD MUTUAL INVESTMENT GROUP
PROPERTY INVESTMENT ZIMBABWE (PVT) LTD
and
THE SHERIFF (N.O.)

HACHIM KITCHENS (PVT) LTD
and
OLD MUTUAL INVESTMENT GROUP
PROPERTY INVESTMENT ZIMBABWE (PVT) LTD
and
THE SHERIFF (N.O.)

KINGDOM EMBASSY ZIMBABWE
and
OLD MUTUAL INVESTMENT GROUP
PROPERTY INVESTMENT ZIMBABWE (PVT) LTD
and
THE SHERIFF (N.O.)

STUARTSON INVESTMENTS (PVT) LTD
T/A TOKANGA
and
OLD MUTUAL INVESTMENT GROUP
PROPERTY INVESTMENT ZIMBABWE (PVT) LTD
and
THE SHERIFF (N.O.)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 October, 2013

T. Mutebere, for 1st, 2nd, 3rd & 4th applicants
E. Jori, for the 1st respondent

MANGOTA J: The abovementioned four matters were referred to me for dealing at one and the same time. On going through the records which relate to each of them, I remained alive to the fact that, whilst the applicants are different and have, accordingly, filed their respective applications with the court separately, everything else which relates to each of the four cases is substantially one and the same thing.

I, for instant, noted that:

- the applicants' causes of action are the same
- the circumstances which gave rise to those causes of action are the same - and
- the relief which each applicant is seeking is the same.

The above described circumstances persuaded me to invoke the provisions of order 12 r 85 of the rules of this court which allows a court, faced with a situation similar to the present one, to order a joinder of parties and actions. The rule reads:

“... two or more persons may be joined together in one action as the plaintiffs or defendants whether in convention or reconvention where-

- (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
- (b) all rights to relief claimed in the action, whether they are joint, several or alternative are in respect of or arise out of the same transaction or series of transactions”.

The applicants filed separate applications against the first and the second respondents. The first respondent was cited in its capacity as the owner of the property which is known as Metro Centre. The property is situated opposite Eastgate complex between Robert Mugabe Road and Robson Manyika Avenue. It stretches from Wayne Street to Fourth Street. The property, it was submitted, is part of industrial plots 1 and 2 STL measuring 11,823 square metres in extent. It comprises 1,106 square metre 4 storey office building, 3725 square meter warehouse building split into six lettable units among other shops and warehouse buildings. The second respondent was cited in his official capacity.

On 24 September, 2013 the second respondent, acting under the instructions of the first respondent, served notices of eviction from the property to the following four tenants of the first respondent:

- (A) Amurak Investments (Pvt) Ltd
- (B) Logmuc Electrical (Pvt) Ltd
- (C) Tifo Services (Pvt) Ltd - and
- (D) ETAA (Pvt) Ltd T/A Johnson's Saddlery And Fine Leatherware (Pvt) Ltd

The first respondent had successfully instituted legal proceedings against its abovementioned four tenants some time last year and had, pursuant to the court orders it obtained, sought to have all four of them lawfully evicted from its property. The eviction of the four tenants was scheduled for 27 September, 2013. The notices of removal which the second respondent served on the tenants prompted the applicants to file with the court the present application, on an urgent basis. They prayed the court to:

- bar the first respondent from evicting them when it evicts its tenants from the property - and
- order the second respondent to stay execution of the writs of ejectment in respect of their properties and/or the premises which they occupy on the property of the first respondent.

The papers which are filed of record show that none of the applicants was cited as a defendant, or respondent, in the proceedings which the first respondent instituted against its tenants some time last year. The court orders which are a result of the mentioned proceedings make no reference at all to any of the four applicants. The writs of ejectment which resulted from the court orders made no reference to any of the applicants. Those writs were, to all intents and purposes, directed at no one else but the first respondent's tenants. The court was, therefore, left to wonder as to what caused the applicants who were not, in any way, joined to the dispute which existed between the first respondent and its four tenants to labour under the apprehension that the eviction of the tenants would adversely affect the applicants themselves.

It was the contention of the applicants that the writs of execution which the first respondent had prepared instructed the second respondent to evict from the premises the tenants and all those who occupied the property through them. All the four of them stated that the words “all those who occupied the premises through them” caused in them the apprehension that the respondents, out of ignorance of the correct position of the matter, might be tempted to work under the genuine, but mistaken, presumption that the applicants were occupying the premises through the tenants whose eviction from the property was/is imminent when they were, in fact, occupying the premises in their own right. It is for the abovementioned reasons, if for no other, that the applicants approached and requested the court to intervene and, in the process, ensure that their continued presence on the property is not only protected but is also allowed to remain intact until the first respondent; through due process of law, has evicted them from its premises.

During the hearing of the matter, the court established that:

- the four applicants occupy separate apartments at the first respondent’s property.
- all four of them entered the apartments which they are in occupation of without the knowledge, consent or authority of the first respondent;
- Zimbabwe National Liberation War Veterans Association (Harare Province) offered the apartments which each of the four applicants is occupying to the applicant.
- none of the applicants is paying rent to the first respondent or to anyone else;
- none of them is occupying the apartment it is in occupation of through any of the first respondent’s tenants - and
- each one of them is occupying the premises in its own right.

It was the contention of the applicants that they have no problem with the first respondent evicting from the premises its tenants. They argued that the eviction in question should be limited to the tenants of the first respondent and should not, therefore, be extended to them. They all remained of the view that, where the first respondent decides to evict them

from the apartments which they are occupying, the first respondent should institute legal proceedings which are aimed at their eviction.

The first respondent filed notices of opposition to each of the four applications. In each notice which it filed, it raised preliminary matters as well as those which substantively dealt with the applications themselves. It also filed an urgent chamber counter-application to each of the four applications. The second respondent did not appear either in person or through anyone else.

It is pertinent that the court examines this matter in the order in which papers were filed with it. The first set of papers which the court received are the four applications. These are the foundation of the present proceedings. Two questions stand out to be dispassionately considered and resolved in so far as this matter is concerned. These questions are the ones which centre on whether, or not:

- the applications are urgent - and, if they are;
- the applicants treated the applications with the urgency which they deserved.

It goes without saying that a positive answer to each of the abovementioned two questions will not unnaturally incline the court to look at the applicants' case more with favour than otherwise. It also follows that a negative answer to the one, or the other, or both of the above questions will incline the court to look at the applications with disfavour. The applicants attached to their respective founding affidavits Annexure D. The annexure is the notice of removal which the second respondent served on the applicants. The notice was served on each of the four applicants on 24 September, 2013. The notice aimed at advising the applicants of their imminent eviction from the first respondent's property. The eviction was pencilled for 27 September, 2013. The notice reads, in part, as follows:

“.... it is in your interest to be present on the above date, especially in the case of Eviction, to enable you to take possession of your personal belongings. Should you fail to be present, we shall proceed to execute the warrant in your absence”

The first respondent did not deny that the applicants were served with the notices of removal by the second respondent. The court remains of the single view that the second

respondent served the applicants with the notices of removal. The applicants would not have acted in the manner which they did if no service of the notices had been made upon them. Their apprehension in this mentioned regard was, therefore, real and not imaginary. They realised that their eviction from the property of the first respondent was imminent. Their conduct wherein they instituted legal proceedings against the respondents cannot be said to have been unreasonable under the circumstances of this case.

That conduct must be viewed against the fact that the first respondent:

- did not join the applicants to the actions which it instituted against its tenants;
- assumed, without ascertaining the correct position, that the applicants were occupying its premises through its tenants which assumption was not correct; and
- did not institute legal action aimed at evicting the applicants in their own right.

Whatever court process which was purportedly served on the applicants following the court orders which the first respondent obtained against its tenants was, therefore, of no legal force or effect. It is when such matters as have been mentioned in the four going paragraphs are taken account of that, from a *prima facie* point of view, the court is inclined to go along with the position that the applications are not only urgent but have also been treated with the urgency that they deserve by the applicants.

The first respondent, it has already been stated, raised a number of preliminary matters. Among those *in limine* matters were/are the following:

- (i) the certificate of urgency which one Benjamin Machengete of Messers Nyamushaya, Kasuso and Rubaya Legal Practitioners filed with the court does not meet the requirements of r 244 of the rules of this court;
- (ii) deponent has no authority to institute legal proceedings on behalf of the applicant;
- (iii) applicant has dirty hands;
- (iv) interim relief and final relief sought are effectively the same - and, in the case of the third applicant;
- (v) deponent has not established the applicant's *locus standi*;

The court will proceed to consider the abovementioned points *in limine*, each in turn. Counsel for the first respondent should be commended for his sterling work in that he did not only raise these preliminary matters and leave it to the court to figure out what he was driving home to but he also supported his arguments on each matter with relevant case authorities. Such arguments were, unfortunately for the applicants, wholly lacking from Mr *Mutebere* who represented them in the applications. He was served with notices of opposition in respect of each case and he, for reasons best known to himself, remained apparently undisturbed by the progressive attitude which his learned friend from the other side exhibited.

Be that as it may, however, the court proceeds to consider the preliminary matters as follows:-

(i) Ad Certificate of Urgency

Mr Benjamin Machengete prepared the certificates of urgency in respect of each of the four applications. Though the certificates are four in number, little effort is required to realise that only one certificate was prepared and duplicated with minor variations which suited the case of each applicant. The contents of the certificates show, in a clear and unambiguous language, that they are on all fours with r 244 of the rules of this court. The rule requires a legal practitioner who prepares a certificate of urgency to give reasons for the urgency of the application. In each case which is before the court, Mr *Machengete* gave the following reasons which establish the urgency of the application:

- * that the applicant faces imminent eviction from the property it is occupying when no due process of law has been instituted against it,
- * no law sanctioned the evictions,
- * the applicant cannot be evicted through any of the first respondent's tenants as it occupies the premise in its own right - and
- * the unannounced evictions would cause irreparable harm to the applicants.

It must be accepted that the applicants are not occupying the premises of the first respondent for the fun of it. They are conducting business or spiritual activities on those premises. Their unsanctioned and abrupt removal from the premises would cause them to suffer serious financial and/or other losses on an unimagined scale. They, therefore, should properly and legally be evicted to enable them not only to prepare their minds for a result which will come to them when it does, but also to prepare the minds of those with whom they do business or spiritual fellowship. Mr *Machengete* cannot, under the circumstances, be said to have acted mechanically or not to have applied his mind to the certificates of urgency which he prepared in respect of each case. What he said tallies in a substantial way with what the applicants stated in their applications. His work cannot be faulted and the court, therefore, accepts the certificates which he prepared as having been in full compliance with r 244 of the rules of this court.

(ii) Ad Founding Affidavit

It is noted that each of the applicants who instituted legal proceedings against the respondents deposed to an affidavit which supported its case. The first applicant - Sovereign Empowerment Centre Tutorial Trust – is a trust which was established in terms of a Notarial Deed of Trust dated 27 May, 2013. The second applicant – Hachim Kitchens (Pvt) Ltd – is a company which is incorporated according to the laws of Zimbabwe. The third applicant – Kingdom Embassy Zimbabwe – is a Church or an *universitas*. The fourth applicant – Stuartson Investments (Pvt) Ltd t/a Tokanga – is a company which is incorporated in terms of the laws of Zimbabwe. The persons who deposited to the founding affidavits in respect of each application did not say that they were doing so for themselves. Each one of them stated that he was deposing to the affidavit for, and on behalf of, the company or the organisation to which he belonged. All of them stated that they had the authority of their company or their organisation to depose to the affidavit upon which its case was anchored. The first and third applicants produced such authority and their matter, therefore, requires no further debate. The first respondent, however, raised the issue of alleged lack of *locus standi* against the third applicant. The court will examine that matter at a later stage. The fourth

applicant's deponent produced the authority during the time that it filed its answering affidavit. Its case on that point is also settled. The second applicant's deponent produced no authority which the law recognises for purposes of such proceedings as the present ones. He produced a copy of a CR 14 form as his purported authority to represent the company. The applicant was legally represented and its legal practitioner knows as much as the court does that filing court applications without the requisite authorities which the law requires in matters of the present nature renders the application of his client not only defective but also fatally so. The applicant's legal practitioner cannot, by any stretch of imagination, persuade the court to accept, even for a moment, that a CR 14 form which the second applicant's deponent produced constitutes the authorisation which the law requires. The court has, therefore no difficulty in accepting the first respondent's legal practitioner's submission which was to the effect that the deponent did not have any authority to institute legal proceedings on behalf of the applicant under the present circumstances. The deponent did not attach to its affidavit a resolution authorising it to represent its organisation.

A resolution by the Directors of a company is a *sine aquo non* matter in all applications of the present nature. The resolution constitutes proof of the fact that the deponent was clothed with the authority to represent the company at the commencement of, or during, litigation [see *Chemist Siziba v Howkhope Investments (Private) Limited and 2 Others* HH108/2008, *Mills Corpse (Pvt) Ltd v Mexico Ko-opersie Bpk*, 1957(2) SA 347].

It follows from the foregoing that the application is fatally defective and cannot, accordingly, be allowed to stand.

The court observed that the deponent to the third applicant's application produced a resolution which the church prepared clothing him with the authority to depose to the affidavit for, and on behalf of, the church. The deponent is a pastor in the church. The resolution is dated 26 September 2013. It was signed by the church's administrator one Bwititi.

In his argument on the point at hand, the legal practitioner for the first respondent stated that the deponent has not established the applicant's *locus standi*. He stated that the

mere allegation that an entity is a church does not grant it *locus standi* in court. He made serious efforts to convince the court to subscribe to the view that a church which intends to institute legal proceedings must make averments which establish its *locus standi*. He, in short, insisted on the point that the exact nature of the applicant must be established as a pre-requisites for the applicant's having *locus standi*.

I must confess that the legal practitioner's argument left me wondering as to what exactly he meant to convey. Because of the confused state in which his argument on the matter was couched, I took the trouble to read around the Latin phrase *locus standi* in an effort to appreciate what he was driving home to.

- Wikipedia, the free encyclopaedia refers to the phrase *locus standi* to mean:
“--- the right to bring an action, to be heard in court or to address the court on a matter before it ---- *locus standi* is the ability of a party to demonstrate to the court sufficient connection to, or harm from, the law or action”.
- Free Dictionary.com states that :
“----- *Locus standi* is the right of a party to appear and be heard before a court-
---.”
- WisegEEK.com discusses the phrase and stresses that:
“..... *locus standi* refers to the fact of whether or not someone has the right to be heard in court..... As a general rule, a person has *locus standi* in a given situation if it is possible to demonstrate that the issue at hand is causing harm and that an action taken by the court could redress that harm...”

The above analysed matters place the case of the third applicant wholly and adequately within the purview of a party which has *locus standi* in court.

The third applicant is an *universitas* which perceived imminent harm coming to it from the respondents. It remained of the view that the court can redress that harm. It has every right not only to appear before, but also to be heard by, the court. It has the right to bring its application to court and its affidavit is, accordingly, properly before the court.

(iii) the third matter which the first respondent raised *in limine* was, or is, that the applicants' hands are dirty and that, because of that stated matter, the court should not hear

them. It argued that a party which is seeking to obtain relief from the court must not only have, but must also come to it with, clean hands. The court is in full agreement with the proposition that persons who seek to obtain relief from the courts must have clean hands. No court will entertain a party's action when the party comes to it with dirty hands. The court was referred to the case of *Deputy Sheriff, Harare v Mahleza and Anor, 1997(2) ZLR425 HC* on this preliminary matter. The court read that case and observed that the facts of the case in question are distinguishable from those of the present applications. The respondent *Mahleza*, made up her mind to break the law right from the beginning to the end. She made every effort to avoid payment of sales tax by purchasing goods through her husband's transport business. When judgement was obtained against her husband for the debts which he owed to a bank and the Deputy Sheriff attached the goods which belonged to her husband together with her own goods, she altered the invoices which related to the goods which she had purchased. She made the alterations of the invoices with a view to showing the court which was then dealing with the case that she, and not her husband's business, had purchased the goods. In making the alterations to the invoices as she did, her aim and object were to mislead the court so that it takes a more favourable view of her case than it would have done if the true and correct circumstances of the case had been allowed to unfold themselves to the court. She was dishonest with the court which she had, in that case, approached. Her hands were dirty. She was also dishonest with the State to which she was duty bound to pay sales tax. The present applicants did not, with respect, exhibit any form of dishonesty to the court. They, if anything, remained candid with the court both in their applications and in the statements which those who appeared and spoke for them made during the hearing. The dirty hands principle, in essence, is applicable to litigants who either defy a court order or make an effort, as happened in the cited case, to mislead the court and come to court to seek its protection when their hands are unclean. The applicants stated that they did not resort to self-help when they took occupation of the first respondent's apartments. They said the apartments in question were dished out to them by the Zimbabwe Liberation War Veterans Association [Harare Province]. The Association, according to them, formed a Management

Committee which administered the affairs of the occupants. That committee, they said, advised them that it would engage the owners of the building with a view to having their occupation of the apartments regularised. The applicants, therefore, did not know that their occupation of the premises was not sanctioned by law. Their minds were, to the extent of the matter, clear, clean and untainted in any way. The argument which the first respondent's legal practitioner raised on this preliminary matter does not, accordingly, hold any water.

(iv) The fourth matter which the first respondent raised *in limine* is that which centres on the reliefs which the applicants are seeking. The first respondent's legal practitioner submitted that the interim relief and the final relief being sought by the applicants are, in effect, the same. He argued that this was improper. He drew the court's attention to the case of *Kuvarega v Registrar- General and Anor*, 1998 (1) ZLR 188(HC) which he said supported his argument in this mentioned regard. This matter cannot be resolved effectively unless the contentious orders are scrutinised.

In all the four applications which are before the court, the interim relief being sought reads:

“ Pending determination of this matter, the applicant is granted the following relief:

1. That the second respondent be and is hereby ordered to stay execution of a writ of ejectment under case no. HC-/12.”

The final order being sought reads:

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

1. That the first respondent be barred from evicting the applicant on the basis of an order granted under case no. HC-/12
2. Costs of suit.”

A casual reading of the matter which pertains to this preliminary issue would give the impression that the reliefs which the applicants are seeking are identical. A closer examination of the same, however, shows that the two orders which are being prayed for are

separate and distinct from each other. The final order, in the court's view, aims at interdicting the first respondent from using the orders which it obtained against its tenants to evict the applicants. The interdict is premised on the argument that the applicants were, and are, not party to the proceedings which the first respondent instituted with a view to evicting the four tenants from its property. The interim relief, on the other hand, is an instruction to the second respondent to stay execution of the writ of ejection pending the outcome of the matter on the return day. In as much as the first respondent instructed, through a court order which it had obtained, the second respondent to attach and remove from its property the applicants' possessions, the applicants are, in the same vein, praying the court to grant an order to them on the basis of which they would be able to instruct the second respondent to stay execution of the writ pending the outcome of the matter on the return day. The applicants' draft orders are in order and the first respondent's argument on this preliminary matter cannot, accordingly, be allowed to stand.

In a paper which is titled Urgent Chamber Application, the applicants' stated in paragraph 4 as follows:

"...if the respondent wishes to evict the applicant same must institute legal process and do so lawfully".

It is in response to this statement that the first respondent filed with the court a chamber urgent counter- application.

It prayed the court to order that:

1. the respondents'(applicants in the main applications) occupation of the premises be and is hereby declared unlawful;
2. in consequence of the order made in paragraph 1 above the respondents and all the persons currently occupying the premises through them be and are hereby ordered to vacate the premises and surrender vacant possession of the same to the applicant within forty eight (48) hours of this order being made failing which the second respondent shall be, and is hereby, directed to eject them from the premises without further notice,
3. in the event that this application is opposed the respondents shall pay the applicant's costs on a legal practitioner and client scale."

To the extent that it filed the present application praying the court for the above mentioned relief, the applicant's mind is *ad idem* with the thinking of the respondents on this matter. It instituted due process of law aimed at evicting the respondents from its property lawfully. Due process, as is known, can commence by way of action or application. The applicant chose the second option to realise its desired end-in-view.

Two matters will assist the court in determining the merits, or otherwise, of the application. The matters in question are:

- (a) the manner in which the four respondents gained access into, and occupied, the premises of the applicant as measured against.
- (b) the action, or reaction, of the applicant to the conduct of the respondents.

The context of the whole case, as stated by the applicant, was that it purchased the property which is the subject of these proceedings in 1992. Its aim and object were to develop on the property a major retail and parking complex.

The applicant stated that the deteriorating economic environment of the late nineties coupled with the hyper-inflationary economic situation which preceded the multi-currency regime of 2009 caused it to shelve the redevelopment of the property. It gave a graphic description of the condition of the property at the time of purchase and subsequent thereto as follows:

“the property's buildings were old and in a bad state at the time of purchase. These continued to deteriorate to a point where they were no longer meeting the minimum safety and health standards. The buildings on the property had become dilapidated. The sewerage system had collapsed, the sewage no longer drained and would overflow into the open space, the roof and gutters were leaking, the brick walls had weathered, the electrical reticulation systems were old and *are now* in a dangerous state”

The description of the condition of the property as given by the applicant tallies in a material way with the contents of the papers which the four respondents attached to their applications. The respondents attached to their respective applications annexure E. The

annexure is a resolution which the Zimbabwe National Liberation War Veterans Association made when it allocated the apartments on the property to the respondents. The resolution was passed by the Association on 8 October, 2012. It, in part, reads:

**RESOLUTION PASSED ON UTILISATION OF UNOCCUPIED BUILDINGS AT
IT AND METRO CENTRES:**

“The executive have resolved that it is necessary to occupy the offices at the abovementioned centres by indigenous business people, individuals and trusts benefiting widows and other disadvantaged groups.

This came as result of unoccupied premises being used by street kids, vagrants and criminals as their safe haven. The City of Harare have established its concern about health hazards being posed by the place hence their desire to close. Looting on things which vagrants can lay their hands on was also a major concern which prompted this office to take this route of occupation after a through vetting on potential occupants. The committee should, therefore, restore sanity throughout the place in compliance to the city by laws.

A recommendation was also made to the effect of engaging the owners for regularising the occupation.

E. CHITERA
Chairman
0772 804 225”

The respondents also attached to their applications annexure F. It is dated 13 October, 2012. The annexure talks about the birth of what the respondents referred to as the Metro and IT Centre Management Committee which the Association of the War Veterans formed and mandated with the responsibility of managing the property and restoring sanity on the same. Part of Annexure F reads:

**“RESOLUTION FOR TO FULLY UTILISE DISUSED OFFICES AT METRO AND
IT CENTRE BY EMPOWERMENT OF INDIGENOUS GROUPS**

After having seen that the entire premises in question are in a sorry state tendered from the previous tenants and street kids. If one or two become occupied to keep the place in one piece, a lot of significant work can be done to bring sanity.

Electricity need to be restored and fittings redone, doors to be replaced, water to be restored, sewer rectified, drainages to be cleared, toilets to revamped, refuse collection thrice weekly painting and general sprucing up.....

Mr Rusere
Secretary”

The above constitutes the manner in which the respondents gained entry into, and occupied, the applicant’s property. The applicant did not deny that the property was in the condition which the Association of the War Veterans’ resolution of 9 October, 2012 stated it to have been. It, if anything, confirmed that to have been the state in which it was, or is.

The applicant purchased the property in 1992. It left it unattended up until August 2009 when it, for the first time, decided to offer its tenants six months’ notice to vacate the premises and make way for the redevelopment of the site. It, in earnest, started to make some serious decisions about the property in, and around, March, 2010. Before then, it treated its property as a *res nullius* to which other persons could help themselves without any pain of the law visiting them. Under the above analysed set of matters, therefore, the respondents could not, and cannot, see themselves as squatters or illegal tenants who were, or are, on the property. They saw, and continue to see, themselves as persons who were, and are, occupying a property which its owner abandoned. After all, they did not resort to self-help when they took occupation of the premises. The Association of the War Veterans which organised them under the Indigenous Business Persons’ banner remained accountable, so they believed, to the owners of the property.

The reasons which the applicant gave for leaving the property in a condition which attracted unauthorised persons to make use of it are unacceptable. There was nothing which prevented the applicant from employing and placing some guards at the property not only to guard against unauthorised persons from entering and making use of the property but also to protect it from any form of abuse. The applicant had the requisite financial means to continue to announce its presence on the property, the deteriorating economic situation which it

referred to notwithstanding. The applicant required very little money to pay a guard or some guards who would look after, and protect, its property from vandalism or unauthorised use. The fact that the Association could pass a resolution to allocate apartments in the property to other persons, form a management committee which managed the premises and dish out apartments in the property to the respondents and others without the applicant raising any finger against such conduct confirms, in a clear and unambiguous way, that the applicant had abandoned its property. The abovementioned matters took place as late as October, 2012 – some ten years after the property had been purchased. Takunda Emmanuel Gumbo who prepared the applicant’s certificate of urgency stated in para 2.5 of the certificate that the fact that the respondents are squatters on the premises was previously unknown to the applicant who only became aware of same through allegations to that effect made by the respondents in the affidavits founding the main applications. What this means, in effect, is that even as late as 29 September, 2013 – the date the main applications were filed with the court – the applicant was not aware of the presence of the respondents on its property.

It is when such matters as these are taken account of that the court finds it hard, if not impossible, to accept the applicant’s contention that its application is urgent. Urgency suggests two things which are:-

- that the matter cannot wait - and
- that the applicant treats it with the urgency which it deserves. GOWORA J, as she then was, stated in *Gwarada v Johnson & Ors* 2009(2) ZLR 159, 160 (HR) that:
“.... the applicant must exhibit urgency in the manner in which he has reacted to the event or the threat, whatever it may be”.

The action, or reaction, of the applicant to the respondents’ conduct showed that the applicant allowed many things to wait. It did not treat its own side of the case with the urgency which the matter deserved. It only acted, or reacted, at the eleventh hour and when it was faced with the respondents’ applications.

The applicant’s further reason for bringing the application on an urgent basis was anchored on what it termed ‘a clear case of commercial and moral urgency of a continuing

nature'. It stated that vacant possession of the premises should have been given to the contractors on 23 September, 2013. The company which it contracted to demolish the buildings on the property had the timeframe of 23 September - 23 November, 2013 to complete the demolition work, according to the applicant. That company had, as at 23 September 2013, mobilised its resources in terms of personnel which was to do the work and the equipment which it would use in the demolition of buildings. The resources are on standby waiting to commence work, it said. The applicant stated, further, that it is already behind schedule in terms of the agreed timeframes which are in the contract that it concluded with the demolition company. It said it stood to incur claims by the demolition company for income lost while the equipment and the personnel are waiting for the surrender of the premises.

In the court's view, the applicant has no one to blame but itself for the situation in which it finds itself. It did not act as a diligent business person who takes all necessary precautions to ensure that persons who occupy its premises - legally or otherwise – have been cleared from, and made to vacate, the same before the demolition company is engaged. It engaged the company and mandated it to commence the work of demolishing the buildings which are at the property on 23 September, 2013. But as late as 29 September, 2013 the applicant was not aware of the presence of the respondents on its property. What it stated on this point is self-inflicted injury which, through the exercise of diligent care, the applicant could easily have avoided.

The other reason which the applicant advanced for bringing its application on an urgent basis was its expressed fear. It said it feared that, since the respondents are now aware that they will be evicted, the respondents may strip the premises of fixtures in a manner which is prejudicial to its interests. This is a very far-fetched argument to say the least. The court has already been made aware of the deplorable state in which the property was when the respondents took occupation of it. The respondents, in the court's view, are the persons who repaired their respective apartments which vagrants and street children had vandalised at the time that the applicant had abandoned its property. When they, therefore, proceed to

remove and take from the property what belongs to them during the time of their lawful eviction from the same, their conduct in the mentioned regard cannot in any way be constructed by the applicant or anyone else for that matter to be working towards the prejudice of the applicant. In any event, the applicant has already contracted a company which will demolish the property's buildings as soon as vacant possession of the same has been made by the respondents. The applicant did not ever state that it will remove fixtures from the property's buildings before the demolition work commences. The point which the applicant raised on this matter is, accordingly, not a sustainable one.

The last, but not least, reason which the applicant advanced for having the matter heard on an urgent basis centres on the applicant's fear of incurring, or suffering, damages which are grounded in delict. It stated that the continued occupation of the property by the respondents places an obligation on it to involuntarily assume the risk, as owner of the premises, of incurring damages in the event of any loss of life or injuries to limbs being suffered by the respondents. The applicant continues to refer to the respondents as illegal occupants whom it wants to be evicted from its property. The applicant knows as much as the court does that the respondents' continued occupation of the property will be at their own risk. Surely, the defence of *volenti non fit injuria* would avail itself to the applicant where the respondents venture to sue it under such circumstances. The applicant's argument in this mentioned regard, like in the other matters which the court has already examined, does not hold any water.

The court noted and mentions, in passing, that the current application does not have a provisional order which states:

- the interim relief - and
- the final order sought.

The applicant attached a draft, and not a provisional, order. This matter alone takes the application out of the purview of applications which are brought to court on an urgent basis and places it into a completely different area of procedural law. Indeed, the applicant argued in a strenuous manner against the idea of having an interim relief which is identical to

the final relief being sought. Its legal practitioner went as far as citing case authority in support of his client's case on the point. However, for some unknown and unexplained reasons, the applicant, this time around, made up its mind to fall deeply and squarely in the pit into which it wanted the respondents, when it argued *in limine*, to remain dead and buried, so to speak.

The court, further noted and mentions, in passing that the certificate of urgency which relates to the chamber urgent counter-applications was not signed by its author. One Takunda Emmanuel Gumbo prepared the certificate. His law firm signed it. That certificate is, accordingly, defective at law.

The court has considered all the circumstances of this case. It proceeded on the basis that the parties to the applications were more, or less, the same; the issues which fell for determination arose from the same set of facts and the subject matter of the applications was the same. It is satisfied that, the first, third and fourth applicants (first, third and fourth respondents in the urgent chamber counter-application) managed to prove, on a balance of probabilities, the urgency of their cases both substantively and on technicalities. The second applicant was not able to measure up to the mark. It fell on one point *in limine* namely the irregular and defective authority which its deponent produced for him to depose to the affidavit for, and on behalf of, his company. The first respondent who was the applicant in the chamber urgent counter-application fell on all fours on substantive matters.

In the result, it is ordered that:

1. the first, third and fourth applicants' applications be, and are hereby granted with costs.
2. the applications of the second applicant in main case and the chamber urgent counter-application be, and are hereby dismissed.
3. In regard to para 2 above, each party bears its own costs

Govere Law Chambers, 1st 2nd 3rd & 4th applicants' legal practitioners
Wintertons, respondent's legal practitioners