BATSIRAI MAPHOSA
versus
AGRICULTURAL BANK OF ZIMBABWE LIMITED
and
CHORUMA MARAIS VALUATION AND ESTATES EXECUTIVES (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 May & 22 June 2016

Urgent Chamber Application

H. H. Mukonoweshuro for the applicant
Z. T. Zvobgo for the first respondent

ZHOU J: This is an urgent chamber application for an interdict prohibiting the first and second respondents from selling or offering for sale the applicant's undivided half share in an immovable property known as Stand 10346 Kuwadzana Township of Fountainbleau Estate situate in the District of Salisbury which is held under Deed of Transfer Number 6293/2000. The property is owned by the applicant and his wife in equal and undivided shares. The background to the application is as follows.

In 2012 the applicant was granted a loan facility by the first respondent pursuant to which he was given a sum of US$15 000. The loan was secured by a note of hand which was registered over the Deed of Transfer in respect of the immovable property referred to above in terms of the Agricultural Finance Corporation Act [*Chapter 18:02*]. On or about 18 May 2016 the applicant was served with a letter of demand written by the first respondent. The letter demanded payment of a sum of US$18 899.87 and interest which represented the amount outstanding in terms of the loan agreement. The letter notified the applicant that the first respondent had taken the decision to foreclose on the security given, and advised the applicant that if he failed to pay the amount outstanding it would take possession of the property and dispose of it in order to recover the amount owed. On 19 May 2016 the first respondent advertised the immovable property for sale in *The Herald* newspaper. The

property was due to be sold on 26 May 2016. On 23 May 2016 the applicant instituted the instant application in order to stop the sale. The applicant's case is that the proposed sale of his property without a court order is unlawful.

The application is opposed by the first respondent. In its opposing affidavit the first respondent raised certain objections *in limine*, namely (a) that the chamber application does not comply with the requirements of r 241 which states that such an application must be in Form 29B; (b) that the certificate of urgency is fatally defective in that it was signed by the applicant's legal practitioner, Hamios Humphrey Mukonoweshuro; and (c) that the matter is, in any event, not urgent. In respect of the first ground of objection Mr *Mukonoweshuro* submitted that the chamber application was not supposed to be in Form 29B but in Form 29 since it was going to be served. In the alternative, he moved that if it be found that there was a non-compliance with the rules then the Court should exercise its powers in terms of r 4C to condone such non-compliance.

Rule 241(1) of the High Court Rules, 1971, provides as follows:

> "A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the application relies.
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

The chamber application *in casu* was served upon the respondents. There was therefore no need to have it accompanied by Form 29B. Although it did not specify the time within which the respondents were to file opposing papers if they intended to oppose the relief being sought, sufficient notice was given to them to do that. Indeed, the first respondent was able to file a notice of opposition and an opposing affidavit before the matter was argued. The second ground, that the certificate of urgency is fatally defective, is predicated upon the conclusions reached in the cases of *Chafanza* v *Edgars Stores & Anor* 2005 (1) ZLR 301(H) and *Mutumwa Dziva Mawere & Others* v *Minister of Mines & Mining Development* HH 87 – 14. The judgments of this court reveal that there is a difference of opinion on whether a legal practitioner is disqualified from preparing a certificate of urgency in a matter in which the legal practitioner or his law firm represents the applicant. See *Madekunye & Ors* v *Madekunye & Ors* HH 190 – 2010; *Route Toute BV & Ors* v *Suspan Bananas (Pvt) Ltd & Ors* HH 27 – 2010; *Williams* v *Katsande & Anor* HH 198 – 2010. Recently, in the case of *Patson Moyo* v *Freda Rebecca Gold Mine Ltd & Ors* HH 280 – 16, I dealt with the issue and

came to the conclusion that the rules do not prescribe that a certificate of urgency must be signed by a legal practitioner from a law firm that does not represent the applicant. The principles relating to the commissioning of affidavits do not have automatic application to the signing of a certificate of urgency because the legislation relating to the commissioning of an affidavit does not apply to a certificate of urgency. I hold the same view in the present case. For that reason I do not accept that the certificate of urgency is fatally defective or defective at all.

Coming now to the question of urgency, it has been held that what constitutes urgency is not the imminent arrival of the day of reckoning, but that a matter is urgent if at the time the need to act comes up the matter cannot wait to be dealt with as an ordinary court application. See *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) at 193F-G; *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H); *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Co. (Pvt) Ltd* HH 116 – 98. The first respondent's contention is that the certificate of urgency does not explain the irreparable harm that is likely to be suffered by the applicant if the relief which is being sought is not granted. The certificate of urgency clearly states that the first respondent intends to sell the applicant's property unlawfully. The loss of the property consequent upon the sale of the property is an irreparable loss. The applicant states in his founding affidavit that he received the letter from the first respondent dated 29 March 2016 on or about 18 May 2016. The first respondent has not tendered proof that the letter was delivered on some other date than that alleged. The instant application was instituted after the applicant became aware of an advertisement on 19 May 2016 in which the property was being advertised for sale. The facts do not show that the applicant waited for the day of reckoning. The application was filed on 23 May 2016 which was only four days from the date on which the sale of the property was advertised by the first respondent. The objection that the matter is not urgent is therefore not sustainable.

On the merits, the applicant's case is that the first respondent is not entitled to sell the property without having obtained judgment for the amount owed by the applicant. The sale of the property without an order of court amounts to self-help. The first respondent has not alleged any grounds upon which it is entitled in this case to proceed as it did to advertise the applicant's property for sale. For that reason the sale cannot be sanctioned as it is sought to be carried out without due process of the law being followed.

In the result, the relief is granted in terms of the draft order as amended.

H. Mukonoweshuro & Partners, applicant's legal practitioners
Dube Manikai & Hwacha, 1st respondent's legal practitioners