CFI HOLDINGS LTD
versus
FIDELITY LIFE ASSURANCE OF ZIMBABWE LIMITED

IN THE HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 & 20 October 2014

Urgent chamber application

Ms *O.T. Sanyika*, for the applicant
S. Hwacha, for the respondent

MATANDA-MOYO J: This is an urgent chamber application for the following relief:

"INTERIM RELIEF

Pending the return, date, the applicant is granted the following relief:

"INTERIM RELIEF
Pending the return, date, the applicant is granted the following relief;

1. The respondent or any persons acting on their behalf or for the purpose of furthering their interests shall be and are hereby ordered to immediately stop demolishing or interfering with the applicant's properties mentioned in clause 3.3 and 3.4 of Annexure C (the Memorandum of Agreement)

TERMS OF THE FINAL ORDER SOUGHT
That you show cause why an Order in the following terms should not be granted:

1. That the respondent or any person acting on its behalf shall be and is hereby interdicted from demolishing applicant's properties alluded to in Clause 3.3 and 3.4 of the Memorandum of Agreement of Sale or interfering with applicant's possession or of its employees of the said properties and so refrain from any such future in reference save as maybe authorized by a binding and operational Order of a competent jurisdiction.
2. ----------."

The respondent raised several points *in limine*. First the respondent took issue with the application filed by the applicant. It is the respondent's submission that the application does not comply with r 241 of the High Court Rules 1971. Rule 241 provides;

"241. Form of chamber applications
(1) 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 applicant 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.
(2) -------."

The applicant conceded correctly that the application is not accompanied by Form 29B but submitted that such omission is not fatal, as I can always proceed in terms of rule 4C and condone non- compliance with the rules. Section 4C provides;

"4C. Departures from rules and directions as to procedure
The court or a Judge may---
(a) Direct, authorize or condone a departure from any provisions of these rules,----where it is satisfied that the departure is required in the interest of justice"

I do not agree with counsel for the respondent. It is pertinent that a chamber application should be accompanied by Form 29B. The applicant is still required by r 241 to state the grounds upon which the application is based in Form 29B. In the instant case the grounds are only stated in the certificate of urgency and in the founding affidavit in violation of r 241. Whilst the applicant is correct that I can in terms of r 4C condone any noncompliance with the rules by a litigant, it is also true that I can only exercise that discretion upon application. That is not a discretion which I can exercise *mero motu*. The applicant has not made any such application for condonation and I cannot condone that which has not been formally put before me. GUBBAY CJ's remarks are pertinent where in the case *Forestry Commission* v *Moyo* 1997 (1)) ZLR254(S) said;

> "I entertain no doubt that in the absence of an application it was erroneous of the learned judge to condone what was on the face of it, a grave noncompliance with R259. For it is making of the application that triggers the discretion to extend time. In *Matsambire* v *Gweru City Council* S-185-195 (unreported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of R259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only had to have regard to both factors which a court should take into account in deciding whether to condone such noncompliance, to appreciate the necessity for a substantive application to be made."

In the matter *in casu* I believe it could have sufficed for the applicant to even make an oral application for condonation. The applicant has not made such application and I cannot *mero muto* grant condonation for noncompliance with rules.

GUBBAY in the *Forestry Commission* case *supra* proceeded to say;

> "Insofar as the High court rules are concerned, rule 4C (a) permits a departure from any provision of the Rules where the court or judge is satisfied that the departure is required in the interest of justice. The provisions of the rules are not strictly peremptory; but as they are there to regulate the practice and procedure of the High Court, in general strong grounds would have to be advanced to persuade the court or judge to act outside them--."

Strong grounds can only be advanced during the application for condonation. In the present case no such grounds have been put forward to persuade me to exercise such discretion. I therefore refuse to exercise any discretion I may have in terms of r 4C.

The respondent also took issue with the certificate of urgency which it submitted was defective. The respondent is of the view that the certificate of urgency addressed legal argument rather than explain the basis upon which the legal practitioners is of the view that the matter is urgent. A look at the applicant's certificate of urgency leaves one with no doubt that the lawyer therein was simply regurgitating the applicant's founding affidavit. In terms of r 244 of the High Court rules a legal practitioner certifying that a matter is urgent must sate the reasons for its urgency. It is apparent from the wording of the certificate of urgent that such legal practitioner did not address his mind to the urgency of the matter.

GOWORA J in the case of Oliver *Mandishona Chidawu & Ors* v *Jayesh Sha & Ors* SC12/13 on p 6 of the cyclostyled judgment had this to say;

> "In certifying the matter as urgent, the legal practitioner is requires to apply his or her mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not suppressed to take verbatim what his or her client says regarding perceived urgency and put it in a certificate of urgency.------."

The certificate of urgency in this matter failed to satisfy the validity test.

The applicant also purported to have approached this court in terms of s 74 of the Constitution of Zimbabwe Amendment (No.20) Act 2013. Section 74 provide;

> "74. Freedom from arbitrary eviction.
> No person may evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."

The applicant has not joined the persons residing in the homes being demolished s 85 of the Constitution lay down the person who are entitled to approach the court, alleging that a fundamental right or freedom enshrined in Chapter 4 of the Constitution has been breached. The following persons are listed as having capacity to approach the court.

"85
(1) ---------
(a) Any person acting in their own interests
(b) Any person acting on behalf of another person who cannot act for themselves'
(c) Any person acting as a member, or in the interests of a group or class of persons;
(d) Any person acting in the public interest and
(e) Any association acting in the interests of its members."

The applicants have failed to satisfy me that they have a right to approach court claiming violation of s 74 of the Constitution without joining the persons whose home are being demolished.

In any case the respondent are not acting arbitrarily but are acting in accordance with the agreement entered into between itself and the plaintiff and in terms of the arbitral award.

I am of the view that the matter should fail on the basis of the points *in limine* raised.

Accordingly the application is dismissed with costs.

Matipano & Matimba, applicant's legal practitioners
Dube, Manika & Hwacha, respondent's legal practitioners