HUNYANI FORESTS LIMITED
versus
BUYWEST INVESTMENTS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 3 March and 11 March 2021

Urgent Chamber Application

M. Tshuma with G Ndlovu, for the applicant
T. Dzvetero, for the respondent

MUSITHU J:

INTRODUCTION

On 23 February 2021, the applicant filed this urgent chamber application seeking relief set out in the draft provisional order as follows:

"FINAL ORDER SOUGHT

That you show cause why an order should not be made as follows;

1. The provisional order be and is hereby confirmed.
2. The Registrar of this Honourable Court be and is hereby directed to set down for hearing the anti-dissipation application in case HC 7094/20 on the next available date on the roll.
3. The Respondent shall bear the costs of this application on an attorney and client scale.

INTERIM RELIEF SOUGHT

1. Pending the determination of the anti-dissipation interdict application filed under case HC 7094/20, the Respondent is and is hereby ordered not to remove the equipment *(res litigiosa)* at its premises at Mt. Hampden, Harare, recovered from Applicant under the judgment in HC 4051/20."

The application was fervently opposed. The parties have had a fair share of legal combat between them before this court. The present application is an offshoot of one such legal contest, which is pending before this court.

FACTUAL BACKGROUND

On 21 September 2018, applicant and the respondent signed an agreement of sale of certain assets referred to in the agreement as "various items of movable equipment being the Treatment Plant assets" (the equipment)[1]. The purchase price was US$60 000.00. Respondent paid the full purchase price but failed to remove the equipment from applicant premises within the agreed timeframe. A dispute arose between the parties when the respondent attempted to remove the equipment from applicant's premises, but was blocked by the applicant. The respondent approached this court for a *mandament van spolie* under HC 4051/20. The application was placed before CHITAPI J who on 14 August 2020 granted the following order:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in following terms:-
> 1. The provisional order be and it is hereby confirmed.
> 2. The respondent to pay costs on an attorney and client-scale if this matter is opposed.
> INTERIM RELIEF GRANTED
> Pending the return date, the applicants be and are hereby granted the following interim relief:
> 1. Respondent and its agents be and are hereby ordered to allow applicant and its authorized agents unhindered access to respondent's premises at Hunyani Forests Limited Yard and Timber Plantation on Lot BA Rakodzi in the District of Marondera for the purposes of accessing, dealing in or removal of a refurbished creosote treatment cylinder 14 meters long and pumps; CCA plant and tanks; pole trailers and sawmill and pole trolleys pending the return date."

Displeased with the outcome, on 28 August 2020 applicant appealed to the Supreme Court under SC 371/20. On 11 September 2020, respondent filed an urgent chamber application under HC 5035/20, seeking the execution of the order by CHITAPI J pending the determination of the said appeal. It turned out that the appeal was defective, prompting applicant to withdraw it. The urgent chamber application for leave to execute pending appeal was not pursued following the withdrawal of the appeal.

Applicant filed an application for condonation and extension of time within which to note a fresh appeal (the application for condonation). In the meantime, pending the determination of the said application, respondent sought to execute the order by CHITAPI J under HC 4051/20 again.

[1] Preamble to the agreement on page 92 of the application

It obtained a Writ of Delivery on 16 September 2020. To protect its interests, applicant filed an urgent chamber application for stay of execution pending the determination of the application for condonation. The application filed under HC 5297/20 was placed before CHITAPI J. He struck it off the roll with costs on 20 October 2020 for want of urgency. On 22 October 2020, respondent with the assistance of the Sheriff proceeded to remove from the applicant's premises, the equipment referred to in the judgment by CHITAPI J under HC 4051/20. The application for condonation was granted by the Supreme Court on 6 November 2020, under SC 387/20. Applicant noted a fresh appeal on 6 November 2020 under SC 484/20.

On 10 November 2020, applicant wrote to the respondent seeking assurances that the equipment would not be dissipated or dealt with in a prejudicial manner pending the hearing of the Supreme Court appeal. The letter reads in part as follows:

> "…We have also been instructed to request the following details of the equipment:
> a) Its current location;
> b) Its current state, including but not limited to any modifications that have been done to it;
> c) Its current use and assurance that such use will cease until the appeal is determined.
>
> May we have a response on all the above by close of business 12th November 2020. Should we receive no response by the stated date, our client will have no choice but to assume that your client intends to act in a manner that confirms our client's aforementioned concerns.
>
> In such eventuality, we have instructions to bring an application for an anti-dissipation interdict against your client. This letter will serve as a basis for such an application…"[2]

There was no response. On 17 November 2020, applicant's legal practitioners wrote a follow up letter. They made reference to their letter of 10 November 2020. They expressed disappointment with the respondent's failure to respond to their letter. They requested a response before close of business on 18 November 2020. Again no response came. On 25 November 2020, applicant's legal practitioners dispatched yet another letter. The letter expressed dismay with respondent's non responsiveness. The letter stated that: *"… we can only assume our client's fears of your client dissipating the property in issue are well founded. We were hopeful that without our client having to resort to costly litigation, your client could enter into a good faith undertaking not to deal in any manner with the property until the appeal was finalized. In light of your client's*

[2] Page 58 of the application

attitude above, our client has been left with no option but to proceed to protect its interests…" No response came.

Applicant contends that its fears that the property would be dissipated were well grounded. Respondent had on various occasions, expressed its intention to move the equipment to Mozambique. Following the respondent's aloofness, applicant filed the anti-dissipation application under HC 7094/20 on 30 November 2020. It seeks the following relief;

> "IT IS ORDERED THAT:-
> 1. The respondent be and is hereby interdicted from using, operating, or dealing with, the equipment it removed from Applicant's premises, pursuant to the judgment of this Honourable Court in case 4051/20, until the appeal pending before the Supreme Court under case number SC 484/20 is determined.
> 2. Within 5 days of the granting of this Order, the Respondent b and is hereby ordered disclose in writing to this Honourable Court the location of the equipment it removed from Applicant's premises pursuant to the judgment of this Honourable Court in case HC4051/20.
> 3. The respondent shall file such written disclose in this Honourable Court's record.
> 4. There shall be no order as to costs, unless Respondent opposes this application, in which case Respondent shall pay costs on the attorney client scale….."

The application was opposed. The highlight of the opposition was that: the equipment had been sold to a third party in Botswana; it was still in the respondent's possession awaiting collection by the third party; the equipment was to be collected in March 2021. On 30 November 2020, just after the anti-dissipation application was filed, but before its service on the respondent, applicant's lawyers received a letter from respondent's lawyers. The letter dated 26 November 2020, reads:

> **"RE: HUNYANI FORESTS LIMITED and BUTWEST INVESTMENTS (PRIVATE) LIMITED: ANTI DISSIPATION OF ASSETS**
>
> We refer to the above matter and to your letters under response.
> Please be advised that we have contacted our client who has advised that some of the equipment has already been disposed of except for the saw mill. Our client has advised that the equipment was disposed of on around the 24th day of October 2020.
> Our client has further advised that the saw mill will be kept in abeyance pending the litigation that you are initiating.
> We trust that the above is in order….."[3]

[3] See letter on page 99 of the applicant's application

The letter solicited an immediate response from the applicant's legal practitioners. In their letter of 2 December 2021, the lawyers expressed shock that the respondent disposed of the equipment fully aware that there was still pending litigation in relation to that equipment. The letter read in part as follows:

> "……..The said application may well have to be withdrawn in light of your letter. Before we take such significant step we have to satisfy ourselves that the equipment may not be available. Your letter of the 26th of November 2020, is not helpful in that regard as it is lackadaisical, states that the equipment has been "disposed of".
> In the circumstances we request the following:
> a) What is meant by saying that the equipment has been "disposed of?"
> b) When did your client formulate the intention to dispose of the equipment. In its application in HC 4051/20 and in various pleadings thereafter it made it clear to and the Court that it needed the equipment for itself not to "dispose" of.
> c) When did you become aware of the said "disposal"?
> d) If the equipment was sold may we have details of such transaction particularly;
> i. The itemized list of the property sold;
> ii. The name of the buyer;
> iii. The sale price;
> iv. A copy of the agreement of sale;
> v. Proof of payment to your client;
> vi. The current location of the equipment;
> We request all this information because we are of the view that client may be is misleading us in order to frustrate the ongoing litigation.
> Furthermore, if it turns out that your client did indeed dispose of the equipment, you will appreciate that it acted improperly and our client is within its rights to seek for an accounting of the equipment. We request that you provide the above requested information by the end of day Monday the 7th of December 2020, failing which we have instructions to bring an application to compel your client to account for the equipment….."[4]

There was no response. On 16 December 2020, applicant filed a supplementary affidavit which dealt with issues raised in the respondent's letter of 26 December 2020. The deponent to the affidavit averred that as at 5 and 7 December 2020, the equipment was still in respondent's possession. On 9 December 2020, applicant's legal practitioners followed up on their letter of 2 December 2020. The follow up letter reads:

[4] See the letter on page 101 of the application

"RE: HUNYANI FORESTS VS: BUYWEST INVESTMENTS (PVT) LTD; ANTI DISSPATION

We refer to our letter dated 2nd of December 2020, to which we have not been forwarded with a response.
This is notwithstanding that we specifically requested such response by the 7th of December 2020. Your client attitude is a cause for concern. More so as our client has credible information that a large part of the equipment namely, 2 large cylinders, and 2 red oxide cylinders are as of the 8th of December 2020 still at your client's premises. For ease of reference we attach the photos to that effect hereto.
You will appreciate that the above goes against the grain of your letter of the 26th of November 2020, wherein you advised that the equipment were disposed of on the 24th of October 2020. In the circumstances we have been left with no choice but to serve you with anti-dissipation application which we intimated in our last letter as already filled…"

The letter yielded no response.

APPLICANT'S CASE

Applicant asserts that there was a calculated effort by the respondent to sabotage its appeal by disposing of the *res litigiosa.* Respondent was fully aware that the equipment was the subject of pending litigation. The agreement of sale with the alleged Botswana based purchaser was conveniently produced as an *alibi* to give the impression that the property was sold when in fact it was not. Applicant wanted the equipment preserved pending the determination of the application for an anti-dissipation interdict under HC7094/20.

That application was unlikely to be heard before March 2021 in view of the Covid 19 lockdown restrictions. Even when courts reopened, there would be a huge backlog of pending cases. By the time the matter was eventually set down, the *res litigiosa* would have disappeared. The application would be rendered academic and of no force and effect. Any judgment rendered by the court would be *brutum fulmen*. The appeal under SC484/20 would also become academic.

Applicant submitted that the balance of convenience favoured the granting of the order as no irreparable harm would be suffered by the respondent. Further, the equipment was in respondent's possession since October 2020. No prejudice would be suffered if its removal was suspended pending the hearing of the anti-dissipation application. It was in the nature of judicial process that litigants must wait for the outcome of litigation, rather than pre-empt it or render it

nugatory by resorting to self-help or taking deliberate action to render its efficacy academic. As part of the terms of the final order sought, applicant also prayed that the application under HC 7094/20 be set down expeditiously.

As regards urgency, applicant submitted that though the exact date of removal of the equipment was unknown, it was likely to happen in March 2020. The application for the anti-dissipation interdict under HC 7094/20 would not have been heard and disposed of by then. Waiting for the urgent chamber application to be heard on the ordinary roll would render the application under HC 7094/20 pointless. The appeal under SC484/20 would become irrelevant.

Applicant avers that it did not sit on its laurels. It treated the matter as urgent at all times. Within 3 days of noting the appeal, with the Supreme Court, it dispatched several letters to the respondent's legal practitioners seeking assurances that the equipment would not be sold. When no responses were forthcoming, on 30 November 2020, applicant brought the anti-dissipation application under HC 7094/20. That application would have been sufficient to impel respondent to act in good faith. Instead, respondent filed and served what applicant termed "a bellicose Notice of Opposition". It showed that respondent was in no mood to compromise.

The anti-dissipation application would have been heard before March 2021, but for the national Covid 19 lockdown which was extended on 15 February 2021. Applicant still managed to file the urgent application notwithstanding the closure of its legal practitioners' offices during the national lockdown period. The matter cried out for urgent attention.

RESPONDENT'S CASE

In response, respondent raised two preliminary points at the outset, lack of urgency and *lis pendens*. Regarding urgency, applicant averred that the founding affidavit did not disclose when the cause of action arose. The certificate of urgency was equally not helpful. The certifying practitioner did not apply their mind to the matter. Respondent was free to deal with the equipment as it pleased, from the date it obtained a spoliatory order against the applicant. The applicant was aware of this position. Respondent purchased the equipment from the applicant and was rightfully the owner. It was in that capacity that it sold the equipment to a third party.

Respondent avers that the cause of action arose from the date the applicant filed the application for the anti-dissipation interdict on 30 November 2020. As at that date, the equipment in dispute had already been disposed of. Applicant became aware of the sale of the property on being served with respondent's opposing papers under HC7094/20 on 4 January 2021. The need to act had already arisen, but was obviously obviated by the disposal of the equipment. Respondent claims that applicant was aware of the disposal and intended removal of the equipment even earlier than 4 January 2021. Applicant was allegedly informed of the disposal through the letter of 26 November 2020. The matter could not be urgent now.

Respondent also argues that the national lockdown could not have affected the filing of the urgent chamber application. Measures were in place for the filing of urgent process during the national lockdown. Practice Direction 2 of 2021, which came into effect on 22 January 2021 made special provisions for the disposal of urgent matters. Even after the extension of the national lockdown on 15 February 2021, Practice Direction 4, permitted the filing and hearing of urgent matters. Notwithstanding all these safeguards, applicant failed to approach the court on an urgent basis. Further, as far back as 28 August when applicant filed the defective Notice of Appeal, it was common cause that respondent had in its possession an executable court order. It could deal with the equipment as it wished at any point.

On the second preliminary point, respondent averred that the relief sought was incompetent. The terms of the interim and final relief sought were incongruent. That further buttressed the respondent's contention that the matter was not urgent.

Regarding the merits, respondent submitted that the application was not only confusing, it was also vexatious. Applicant was seeking an interdict, pending another interdict. That was unfathomable at law. Applicant was in the habit of bringing these defective processes, which had no prospects of success. Respondent was unnecessarily being inconvenienced and made to incur costs in defending such hopeless litigation. Both the anti-dissipation application and the appeal were hopeless. They had been filed for fun. The barrage of litigation was all emanating from the applicant's spoliatory conduct. The court was referred to the following cases involving the same parties: HC4051/20; HC5035/20; HC5297/20; HC6387/20; HC7094/20 and SC387/20.

The appeal at the Supreme Court was not concerned with ownership of the equipment, but spoliation. Ownership of the equipment had not been challenged even before the sale to the third party. Respondent had paid the full purchase price to the applicant. Delivery had been done, although the equipment remained at applicant's premises. Respondent was effectively the owner of the equipment and had rights to deal with it as it wished. Because of greed, applicant had repossessed the equipment unlawfully prompting respondent to approach the court for redress. Respondent was successful. Execution was lawfully done. Respondent disposed of the equipment prior to the lodging of the appeal. Applicant lodged the anti-dissipation application after the equipment had been sold. It was surprising that applicant had not withdrawn that application. There was no equipment to preserve. The concession by applicant that the court has not pronounced on the issue of ownership showed that applicant had an alternative remedy to pursue. It could proceed with a claim for damages, than overloading the court with unnecessary litigation.

The averment that the property was *res litigiosa* was denied since the property was sold when there was no pending litigation. Even then, property which is *res litigiosa* was not always immune from sale depending on the circumstances. In their letter of 2 December 2020, applicant's legal practitioners acknowledged that the equipment had been sold.

Respondent revered the importance of court process. In *casu*, it was the applicant which was over loading the courts with ill-conceived litigation. Applicant simply needed to withdraw all pending litigation as any outcome would be *brutum fulmen*. No harm would befall applicant if the relief sought was not granted. The equipment had been fully paid for by the respondent. Applicant allegedly repossessed the equipment on the basis that it had not been removed from its premises timeously. Now that the court had settled that matter, applicant was raising hell. Respondent had full access to the equipment, even when it was still at the applicant's premises. It did so as the owner. Applicant even tried to buy back the equipment from the respondent. This was confirmed through correspondence between the parties' legal practitioners during the period 1 to 12 October 2020. Applicant was estopped from denying that the respondent was the owner of the property. The pending litigation was hopeless.

Respondent had sold the equipment, thereby incurring certain contractual obligations to the innocent buyer. Such contractual obligations accrued at a time nothing hindered the sale of the equipment. The contractual obligations had to be fulfilled. The third party was not a party to the proceedings. Respondent would be exposed to contractual penalties for breach if the relief sought was granted. The court was urged to dismiss the application with costs on the higher scale.

THE SUBMISSIONS

At the commencement of oral submissions, counsel were requested to address the court on both preliminary points and the merits so as to obviate the need for another hearing, in case the points *in limine* failed to find favour with the court. The hearing proceeded on that basis.

Urgency

For the respondent, Mr *Dzvetero* submitted that the application was not urgent. The applicant failed to act when the need to do so arose. The interim relief by CHITAPI J required respondent to be granted unhindered access to the applicant's premises for purposes of *"accessing, dealing in or removal"* of the equipment. As of 14 August 2020, applicant was aware that respondent had an unfettered right to deal with the property as it pleased. It ought to have taken necessary steps to rescue the equipment if it so desired. The Notice of Appeal filed with the Supreme Court was against the spoliatory relief granted by CHITAPI J. The application for stay of execution was dismissed by the same judge. The present application ought to have been filed simultaneously with the filing of the Notice of Appeal. Mr *Dzvetero* further submitted that the cause of action arose on 6 November 2020 when the applicant lodged its appeal with the Supreme Court. At the time of the filing of the anti-dissipation application, applicant was made aware that the equipment had been sold. Respondent filed its notice of opposition on 23 December 2020. The notice of opposition reaffirmed this position. Still the applicant did not act.

In reply Mr *Tshuma* submitted that the matter ought to be considered in its proper context. The spoliation proceedings left the question of ownership unresolved. Applicant became aware of the possibility of the disposal of the equipment and filed an anti-dissipation application. The disposal of the equipment would render the Supreme Court appeal academic in the event that the court found for the applicant. Court orders had to be respected. Respondent was declared to have

peaceful and undisturbed possession of the equipment. It was now seeking to surreptitiously transform possession into some form of ownership. Further, it was seeking to pre-empt the outcome of the Supreme Court appeal by selling the equipment prematurely. Respondent could not transfer rights that it did not have. The Court was referred to the case of *Chenga v Chikadaya & Others*[5].

No court had made a declaration of ownership as yet. The respondent ought to approach the court for a declaration of ownership in the equipment first. The anti-dissipation application was intended to prevent the respondent from frustrating the Supreme Court appeal. Once that application was filed, there was no need to file yet another application dealing with the same subject matter of litigation. It had been hoped that the application would be disposed of timeously. The urgent chamber application was meant to forestall the removal of the equipment pending the determination of the anti-dissipation application. The matter was urgent.

A matter was urgent if there was imminent harm. Counsel referred to the case of *Document Support Centre (Private) Ltd V T. F. Mapuvire*[6]. The filing of the anti-dissipation application was a clear manifestation that applicant intended to protect its rights.

ANALYSIS

The test for urgency has been the subject of discussion in a plethora of cases in this jurisdiction. In *Kuvarega v Registrar General & Anor*[7], CHATIKOBO J, explained urgency eminently as follows:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait."

In *Triple C Pigs (Partnership) and Colcom Foods Limited v The Commissioner-General Zimbabwe Revenue Authority*[8], GOWORA J (as she then was), was even more elaborate in her analysis of urgency. She said:

> "Naturally, every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief the more it seems that justice is being

[5] SC 232/10
[6] HH 117/06
[7] 1998 (1) ZLR 188 (H) at page 193F
[8] HH 7/2007 at pages 4-5

> delayed and thus denied. Equally courts, in order to ensure delivery of justice would endeavour to hear matters as soon as is reasonably practicable. This is not always possible however and in order to then give effect to the intention of the courts to dispense justice fairly a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen.* I would however, in closing, wish to quote respectfully the remarks of GILLESPIE J in *General Transport & Engineering P/L & Ors v Zimbank Corporation P/L*[9], quoting from his own remarks in *Dilwin Investments P/L t/a Formscaff v Jopa Engineering Company Ltd*[10] the learned judge stated:
>
> > "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."[11]

A litigant must act without delay when the need to do so arises. It must not wait for the day of reckoning to arrive and suddenly spring into action. The applicant must demonstrate that it deserves to be accorded special treatment in having its matter heard on an urgent basis. For that reason, the certificate of urgency and the founding affidavit must leave the judge in no doubt that the matter craves for urgent attention, and that the applicant treated the matter as such. It must also be demonstrated that the applicant will suffer irreparable harm if the matter is not dealt with urgently. In *casu*, Nyasha Munetsi certified the urgency of the matter as follows:

> "My conclusion that this matter is urgent is based on the following facts which appear from the Applicant's founding affidavit:-
>
> 1. There is a concerted effort by the Respondent to frustrate the appeal process by removing the *res litigiosa* from this Honourable Court's jurisdiction and beyond the Applicant's reach.
> 2. The parties are involved in a dispute over certain heavy equipment.
> 3. The Respondent is in possession of the *res litigiosa* having removed same from Applicant's premises by judgment of this Honourable Court under case HC4051 in August 2020 granting Respondent spoliatory relief.

[9] 1998 (2) ZLR 301 (H) at 302
[10] HH 116/98
[11] See also the sentiments of CHITAPI J in *Pascoe v Ministry of Lands & Rural Resettlement and Two Ors* HH 11/17 at page 9 of the judgment.

4. Applicant appealed to the Supreme Court on the 6th of November 2020 under case SC484/20. The appeal remains pending. There is no movement in this regard owing to the Level 4 COVID 19 lockdown currently in place.
5. Respondent having refused to make an undertaking not to dispose of the equipment pending the finalisation of aforesaid appeal, Applicant on the 30th of November 2020, brought an application for an anti-dissipation interdict under case HC7094/20. The application is pending.
6. Respondent on the 23rd of December 2020 in a Notice of Opposition served on the 4th of January 2021, has opposed the application arguing that whilst the *res litigiosa* is still at its premises in Harare it has been sold to a 3rd party in Botswana and may be collected around March 2021.
7. The purported sale is challenged and the authenticity of the agreement is challenged.
8. Despite invitation the Respondent has not provided any proof of payment for the *res litigiosa* by the alleged 3rd party.
9. Due to the COVID 19 lockdown, there is no chance that the anti-dissipation interdict application under case HC 7094/20, will be heard before the *res litigiosa* is collected and removed from the jurisdiction of this Honourable Court.
10. By extension, the *res litigiosa* will be removed beyond the Applicant's reach.
11. In the circumstances, Applicant has approached this Court on an urgent basis to seek an interim preservation order to prevent the *res litigiosa* from being removed from the Applicant's premises in Harare. Pending the determination of the anti-dissipation interdict application in HC 7094/20.
12. It is my belief that the present urgent application deserves to be heard urgently. I say so because:
    i) Given that the application for an anti-dissipation interdict, in HC 7094/20 will not be heard before March 2021, there is a real danger that if this Honourable Court does not interdict the removal of the *res litigiosa* from the Respondent's premises, by the time it does so on the ordinary roll the equipment would have left the country.
    ii) Should it leave the country, such equipment will be effectively out of the jurisdiction of this Honourable Court.
    iii) In such an event, the application for an anti-dissipation interdict in HC7094/20 would become academic and pointless.
    iv) Indeed, any order granted in favour of the Applicant in that application would pyrrhic as the equipment sought to be protected from dissipation would long beyond the reach of the Applicant and indeed this Honourable Court.
    v) Should the equipment have left the country the appeal in the Supreme Court even if decided in favour of Applicant would be also meaningless as they will be no equipment to return to Applicant's premises.
    vi) The recovery of the *res litigiosa* from outside Zimbabwe will be an expensive and complicated exercise if even at all possible.

13. For the above reasons, I submit that the Applicant will suffer irreparable harm if this application is not heard on an urgent basis an interdict is granted……."

The certificate of urgency spans a good 28 paragraphs under five pages. Paragraphs 14 to 18 speak about the need to preserve the integrity of the courts and the administration of justice by ensuring that the outcomes of the pending appeal and the anti-dissipation application are not

rendered academic. Paragraphs 19 to 21 speak about the effect of the COVID 19 lockdown on the setting down of the anti-dissipation application. That application could not be set down for hearing following the further extension of the lockdown. Paragraph 22 speaks about the attitude of the respondent to the anti-dissipation application. It seemed unperturbed and willing to have the equipment removed by the purchaser in March 2021. Paragraphs 23 to 24 simply reasserted applicant's endeavours to have the matter dealt with expeditiously. It did not sit on its laurels despite the challenges instigated by the national lockdown. In paragraphs 25 to 28, applicant reaffirmed its view that the balance of convenience favoured the disposal of the matter on an urgent basis. The *res litigiosa* was still at the respondent's premises, and it was unknown when exactly removal would take place in March 2021.

The applicant dealt with the issue of urgency in paragraphs 61 to 69 (a-f) of the founding affidavit. There is no material difference in content with the certificate of urgency. What is striking though is that both appear to justify the filing of the anti-dissipation application on an urgent basis. The urgent chamber application was forgotten. Just to illustrate this point, in paragraph 69 (a) – (d) applicant states:

> "69. The following demonstrates how importantly and urgently Applicant treated this matter.
>
> a) Applicant within 3 days of noting its appeal with the Supreme Court caused to be directed various letters to Respondent's legal practitioners, the first one on the 9th of November 2020, seeking assurance the *res litigiosa* would not be dissipated.
> b) When after various letters, no responses were forthcoming, Applicant on the 30th of November 2020, brought the anti-disspation interdict in case HC7094/20 to protect the *res litigiosa*.
> c) That application on its own should have been enough to stop any litigant acting in good faith. It did not. Instead Respondent on the 4th of January 2021, served a bellicose Notice of Opposition, effectively saying the existence of the application meant nothing to it and the *res litigiosa* would be removed by March 2021.
> d) Ordinarily, the anti-dissipation application would, but for the lockdown which began the very next day on the 5th of January 2021, have been heard long before March 2021…."

Paragraph (e) then talks about the extension of the national lockdown on the 15th of February 2021, and the fact that courts remained closed. In paragraph (f) applicant asserts that it still brought this application notwithstanding the closure of its lawyers' offices because of the

national lockdown. Both the certificate of urgency and the founding affidavit do not address the crucial question of when the need to act arose. They do not state when the conduct that triggered an approach to this court on an urgent basis arose.

One readily appreciates the difficulties afflicting the applicant's cause, if one considers the events preceding the filing of this application. Following the granting of the spoliatory relief by CHITAPI J on 14 August 2020 under HC4051/20, applicant filed a defective appeal under SC 371/20 on 28 August 2020. On 10 September 2020, respondent applied for leave to execute pending appeal. On 14 September 2020, applicant withdrew the defective appeal under SC 371/20, and filed an application for condonation at the Supreme Court. On 24 October 2020, respondent and SHASHA TIMBERS of Francistown Botswana signed an agreement for the sale of the equipment. Clause 5 of that agreement states:

> "5. The equipment shall be collected by the purchaser from the seller's premises in Mount Hampden at the purchaser's convenience, but not later than 30 March 2021. If collection is not done by 30 March, the seller shall be entitled to charge and levy storage fees from the purchaser at a rate which is at the discretion of the seller."[12]

The agreement was attached to the respondent's opposing affidavit to the anti-dissipation application. The application for condonation was only granted on 6 November 2020, and the applicant proceeded to lodge a fresh appeal with the Supreme Court. It follows that between 14 September 2020, when applicant withdrew the defective appeal and 6 November 2020 when the application for condonation was granted, there was nothing stopping respondent from selling the equipment on 24 October 2020.

Mr *Tshuma's* submission that applicant could not deal with the property as owner since the spoliatory relief was concerned with possession is untenable. I say so for the following reasons. Applicant does not deny that respondent purchased the equipment and paid the purchase price in full. The alleged breach arising from the respondent's failure to remove the equipment from the applicant's premises, did not in my view take away the respondent's rights to deal with the equipment as it pleased. No court has as yet declared that respondent breached the agreement of

[12] See agreement on page 97 of the application.

sale. There are no proceedings pending in any court in terms of which respondent is precluded from exercising ownership rights in the equipment. The risk and profit clause in the agreement of sale between applicant and respondent stated:

> "5. Risk and Profit in respect of the Assets shall pass from the Seller to the Purchaser as from the date upon which full payment is received by the Seller, at which time the Purchaser shall assume responsibility for the security of the Assets, including insurance thereof."[13]

Respondent was entitled to full enjoyment of the fruits of the sale upon payment of the purchase price. In any case, between 1 October and 12 October 2020[14], correspondence was exchanged between the parties' legal practitioners with proposals for the re-purchase of some of the equipment from the respondent. Such negotiations occurred in the context of the respondent being the owner of the equipment. In the premises, applicant cannot suddenly perform a somersault and deny that respondent did enjoy ownership rights.

I agree with Mr *Dzvetero's* submission that from the time that respondent obtained spoliatory relief, respondent was at large to deal with the equipment as it pleased in the absence of a valid Notice of Appeal, and proceedings to assert applicant's ownership rights. What prompted the filing of the application for the anti-dissipation order, was respondent's failure to give applicant assurances that the equipment would not be sold pending the hearing of the Supreme Court appeal. On 30 November 2020, respondent's legal practitioners communicated the bad news that applicant surely dreaded to hear. The equipment had been sold, save for the saw mill.

Respondent proceeded to oppose the application for the anti-dissipation order. Attached to its opposing affidavit was the agreement of sale between respondent and SHASHA TIMBERS, the alleged buyer of the equipment. Paragraph 5 of that agreement made it clear that the equipment would be collected from the respondent's premises by no later than 30 March 2021. The notice of opposition was served on the applicant on 4 January 2021. Applicant did not act. The fact that the country was under national lockdown was a lame excuse, in the court's view. Arrangements were in place for the filing and disposal of urgent matters.

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[13] See page 93 of the application.
[14] Letters on pages 103 – 112 of the application.

This application was only filed on 24 February 2021, almost one and half months from the date applicant became aware that respondent was unrelenting on its quest to have the equipment removed from its premises. In fact on 2 December 2020, in response to the respondent's lawyers letter of 26 November 2020 notifying them of the sale of the equipment, applicant's lawyers had intimated that "*the said application may well have to be withdrawn in light of your letter. Before we take such significant step we have to satisfy ourselves that the equipment may not be available. Your letter of the 26th of November 2020, is not helpful in that regard as it lackadaisically, states that the equipment has been "disposed of".* The application referred to was the pending anti-dissipation application. There is no explanation as to why applicant failed to file this application back then in light of the respondent's intransigence. The equipment had already been sold and what remained was its removal. The applicant appears to have been jolted into action by the imminent arrival of the day of reckoning

In view of the foregoing, this court is satisfied that the applicant did not act when the need to do so arose. The matter is not urgent and the application must fall on that basis. Having made that finding, it becomes unnecessary to traverse the remaining preliminary point and the merits of the application.

COSTS

Respondent sought the dismissal of the application with costs on the legal practitioner and client scale. It argued that applicant was a serial abuser of court process in light of the several vexatious proceedings it has instituted before the courts. In *Nel* v *Waterberg Landbouwers Ko-operative Vereeniging,*[15] the court said of such costs:

> "The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation…."[16]

[15] 1946 AD 597 at 607, Per TINDALL JA.

[16] See also *In re Alluvial Creek Ltd* 1929 CPD 532, where GARDNER JP said at page 535:

> "An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the

An award of costs must relate to the circumstances of each case. In the exercise of my discretion, I have considered that respondent partly contributed to the institution of these proceedings. In its letter of 2 December 2020, applicant had hinted at withdrawing the application for the anti-dissipation interdict if respondent had furnished the information requested in that letter pertaining to the sale of the equipment to the third party. Respondent did not respond to the letter. In all probability, had that information been furnished, maybe the anti-dissipation application which begat the present application would have been withdrawn. For that reason, the prayer for costs on the high scale is not justified

DISPOSITION

Accordingly, it is ordered as follows;

1. The application is not urgent and it is hereby struck off the roll of urgent matters.
2. Applicant shall bear respondent's costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Antonio & Dzvetero, respondent's legal practitioners

proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious".