GOOD LIVING REAL ESTATE(PVT) LTD
versus
ADAM AND COMPANY (PVT) LTD
and
SGI PROPERTIES (PVT) LTD
and
HONOURABLE JUSTICE SMITH

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 & 27 February 2015

URGENT CHAMBER APPLICATION

T Hashiti, for applicant
T Garabga, for first and second respondents,
In person, third respondent

MUREMBA J: On 16 February 2015 I delivered an *ex tempore* judgment in this matter dismissing this application with costs on a legal practitioner client scale. Now I have been asked for the written reasons thereof and these are they.

The facts of this matter are common cause. The applicant and the first and the second respondents are involved in an arbitration dispute before the third respondent. The arbitration proceedings started in October 2013 and are still on going. When the applicant filed this application on 13 February 2015, the hearing of the arbitration proceedings had been postponed to 16 February 2015 for continuation.

The background of the matter is that during the course of the arbitration proceedings and on 29 May 2014 and 8 September 2014, the third respondent granted two interim awards in favour of the first and the second respondents. Dissatisfied by the granting of the interim awards the applicant filed two applications in this court challenging the awards. The reference files are HC 5209/14 and HC 750/15. These

two applications are still pending before this court.

The applicant filed this urgent application for the purposes of having the arbitration hearing scheduled for the 16th of February 2015 stayed pending the determination of the two pending applications. The applicant is of the view that the outcomes of the two applications have a bearing on the dispute and as such the arbitration proceedings ought to be stayed until the two applications have been disposed of by this court.

On 11 February 2015 the applicant filed an ordinary court application under case number HC 1268/15 seeking the same relief as the present one. That application was served on the first and the second respondents' legal practitioners on the same day of 11 February 2015 and on the third respondent on 12 February 2015 at 10:28am. On the same day of 12 February 2015 the applicant's counsel wrote a letter to the third respondent and this letter accompanied the court application. The letter was asking the third respondent to give an assurance to the applicant that he was not going to proceed with the hearing on 16 February 2015 since he had been served with the court application to stay proceedings pending the determination of the two applications, HC 5209/14 and HC 750/15. In that letter, the applicant's lawyers indicated that if they did not get a response on that day by 4pm from the third respondent in writing to the effect that proceedings were not going to continue, they were going to file an urgent chamber application.

The applicant's lawyers did not get any response from the third respondent by 4pm of 12 February 2015. This prompted them to file the present urgent chamber application on Friday the 13th of February 2015 in the evening. I had to be called from home around 7:30pm to attend to it. I set the matter down for hearing on Sunday 15 February 2015 at 2pm because I was not available on Saturday 14 February 2015.

As the hearing started, I was served with the first and the second respondents' notice of opposition. As a result, I was not able to read through the opposing affidavit before the hearing. It being a Sunday and all the parties being in attendance I decided to hear the parties and then go through the opposing affidavit later. The third respondent who is a retired judge of this court who was a self-actor had not prepared

any written response to the application. He made submissions that as the arbitrator between the applicant and the first and the second respondents he was not taking any sides, but he said that he just wanted to shed light on some issues for my benefit. So he made some submissions during the hearing.

I started by asking Mr Garabga if he had any points in *limine* that he wanted to raise and he said he had none. So we went straight into the merits of the matter with the applicant addressing me first. He submitted that the application should be granted for the reason that since the High Court which is superior is now seized with the applications, the arbitrator ought to stay proceedings until determinations have been made.

What emerged from Mr *Garabga* was that the letter of 12 February 2015 from the applicant's lawyers which was addressed to the third respondent asking the third respondent to give an assurance that he was not going to proceed with the arbitration proceedings on 16 February 2015 was not served on the first and the second respondents despite them being interested parties. I found it a very shameful thing that Advocate *Hashiti* insisted that the first and the second respondents had been served with that letter when they had not been served. There was no proof to that effect. Even the letter itself does not show that it was copied to the first and the second respondents.

All the three respondents indicated that from the time the arbitration proceedings started, about 5 postponements of the hearing had been made by consent, but they were all made at the instance of the applicant. They said each time the applicant sought a postponement it would engage new lawyers. The other reason was that the applicant continued to say its key witness one Mr Okeke was not feeling well and was out of the country. The third respondent indicated that on the occasions that he granted the requests for postponement for this reason, he was never furnished with medical proof of the witness' illness. He said that he recently told the applicant that he now wanted medical proof of Mr Okeke's illness if he was going to grant another postponement because they were not making any progress with the arbitration proceedings. Advocate *Hashiti* did not make any submissions to challenge these

averments by the respondents.

The three respondents also highlighted that the hearing of the arbitration proceedings was postponed to 16 February 2015 on 29 January 2015 by consent, and the request for the postponement had been made by the applicant. Again Advocate *Hashiti* did not dispute that. The first and the second respondents were surprised that the applicant was now making the present application. To them it was just an afterthought by the applicant which was meant to delay the finalisation of the arbitration proceedings. Mr *Garabga* argued that the matter had been postponed on 29 January 2015 and there was no reason why the applicant had waited until 11 February 2015 to file the court application and less than 24 hours later to file the present chamber application. To Mr *Garabga* the matter was not urgent at all. Let me say this submission on urgency by Mr *Garabga* during the hearing of the merits surprised me because naturally, it should have come as a point in *limine.* Earlier on he had said he had no points in *limine* that he wanted to raise.

Personally I had not raised any query on the issue of urgency because it was not apparent on the face of the application that the matter was not urgent. The application did not disclose, on the face of it, that the arbitration hearing had been postponed to 16 February 2015 from 29 January 2015.

Be that as it may, Mr *Garabga* further submitted that since the continuation of the arbitration hearing was scheduled for 16 February 2015 the application should be dismissed to allow the parties to appear before the third respondent. He said since the third respondent is seized with the matter, the applicant can make his application for stay of arbitration proceedings before the third respondent. The third respondent also made submissions that since he was already seized with the matter he did not see why the applicant had not made the application for stay of proceedings before him all along from the time it made the two High Court applications. He said that if the applicant had made the application he would have heard the application and made a ruling on whether or not to grant it. He further submitted that he had not responded to the applicant's letter of 12 February 2015 because it required him to respond by 4pm of the same day yet when that letter was served at his office at 10:28 am he was not in

the office. He only got to the office at 4pm and that is when he saw the letter. It was already too late for him to respond. It was already past the deadline that the applicant's lawyers had given. He further averred that on that same day he also received another letter from Mr *Nkomo* of Mtetwa & Nyambirai Legal Practitioners also representing the applicant stating that on 16 February 2015 they were going to seek a postponement of the hearing for the reason that its witness Mr Okeke was still unwell. To him the two letters were in conflict.

Having heard the parties I dismissed the application on the merits since the parties had mainly addressed me on the merits. I considered the requirements of a temporary interdict since what the applicant is seeking is an interim interdict. The requirements are as follows:

1) The applicant must prove a *prima facie* right.
2) There must be a reasonable apprehension of irreparable harm if the interdict is not granted.
3) There must be no other ordinary adequate or appropriate remedy which would give the applicant some protection.
4) The balance of convenience must be in the applicant's favour. This means that the circumstances must be such that the prejudice suffered by the applicant if the interdict is not granted will be greater than the prejudice suffered by the respondent if the interdict is granted. See the cases of *Hix Networking Technologies* v *System Publishers (Pty) Ltd & Another* 1997 (1) SA 391 (A) at 3981-399A and *Flame Lily Investments Company (Pvt) Ltd & Another* 1980 ZLR 378 (G).

As correctly submitted by Mr *Garabga* and the third respondent there is an alternative satisfactory remedy that is available to the applicant. The remedy is for the applicant to make this application for stay of proceedings before the third respondent who is already seized with the arbitration matter. Despite the availability of that remedy, the applicant never sought to make an application before the third respondent from the time it filed the two applications to this court. This is a case where the

applicant ought to have exhausted that domestic remedy before rushing to this court with the present application.

Advocate *Hashiti* submitted that they had filed this urgent application because the third respondent had not responded to the applicant's request not to proceed with the hearing on 16 February 2015. For a matter which had continued to be postponed from the time the two High Court applications were made I do not see why the applicant did not make this application before the third respondent. I find no merit in the course of action that the applicant took.

It would appear that the applicant would do anything to have the finalisation of the arbitration proceedings delayed. It waited until the 11th hour to make both the ordinary court application and the present application for stay of the arbitration proceedings. Besides that the applicant had even tried to manipulate the third respondent by way of an ordinary letter into giving an assurance that he was not going to proceed with the hearing. This letter was not even served on the first and second respondents. That was highly unprofessional, unprocedural and improper especially coming from legal practitioners. As interested parties the first two respondents deserved to be served. I do not think that the applicants really expected the third respondent to grant the applicant's request without hearing the first and the second respondents. What the applicant ought to have done was to make a proper application for a postponement or stay of proceedings before the third respondent, either in writing or orally, giving the first and second respondents a chance to respond. No such application can be made without the other party being given a chance to be heard. It defeats the principle of the *audi alteram partem* rule.

I would like to make some remarks on the issue of urgency. In the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at 193 F-G CHATIKOBO J said,

> "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. Urgency, which stems from, a deliberate or careless abstention from action until the dead line draws near is not the type of urgency contemplated by the rules."

In *casu* if this issue had been raised as a point in *limine* I would have struck off the matter from the roll for the reason that the matter was not urgent. The interim awards were granted in May and September 2014. The two court applications to challenge them were made last year and in January this year before 29 January 2015. So the urgency arose at the time the court applications were made. Obviously it dawned on the applicant at the time of filing the applications that their outcomes had a bearing on the main dispute. Under the circumstances, I do not see why the applicant waited until 12 February 2015 to make the court application for stay of the arbitration proceedings. Before that, the applicant had been making requests for postponements of the hearings for totally different reasons, for instance that its key witness was ill. The question is why were they not raising the issue of the need to stay proceedings pending the determination of the two court applications? It would appear that the application was made as an afterthought, just to delay the finalisation of the arbitration proceedings. In any case the latest arbitration hearing was postponed to 16 February 2015 on 29 January 2015 by consent at the instance of the applicant. Honestly by that time, the applicant already knew that the outcomes of the two applications pending in this court had a bearing on the main dispute. There is no explanation why the applicant asked for a postponement of the hearing to 16 February 2015 instead of making an application for stay of the proceedings. That application could have been made to the third respondent since he is the one who is presiding over the matter. There was no justification for the applicant to wait until the 11th of February 2015 to make the ordinary court application and the 12th of February 2015 to make the present urgent chamber application. It is apparent that the urgency was self-created.

It appears to me that this was just a tactic by the applicant for it not to appear before the third respondent on 16 February 2015 for the third respondent had indicated that in the absence of medical proof to show that Mr Okeke was ill, he was not going to grant another postponement. This is evidenced by the letter dated 12 February 2015 which was written by Mr *Nkomo* of Mtetwa & Nyambirai Legal Practitioners to the third respondent indicating that on the 16th of February 2015 the applicant was going to seek a postponement of the hearing to a further date to enable Mr Okeke who was

ill to be available. What is interesting is that the date of 12 February 2015 is the same date the third respondent was served with the court application for stay of arbitration proceedings together with the accompanying letter which was asking the third respondent to give an assurance that he would not proceed with the arbitration hearing on 16 February 2015. These were served by Zuze Tawanda Law Chambers, a different law firm. Zuze Tawanda Law Chambers was representing the applicant for the first time and it appears that it was not even aware that Mtetwa & Nyambirai Legal Practitioners were also representing the applicant in the same matter. This confirms what was said by the respondents that the applicant was in the habit of changing legal practitioners each time the hearing was postponed. It is puzzling that the applicant engaged two different law firms to represent it at the same time. The two law firms ended up writing letters with different requests to the third respondent on the same day. One was asking the arbitrator to stay proceedings pending the determination of the two High Court applications while the other was asking for a postponement to enable Mr Okeke to recover.

All these actions by the applicant show that it was desperate not to have the hearing of 16 February 2015 proceed.

Despite the lack of urgency I decided to dispose of the matter on the merits. The point being that the applicant has an alternative satisfactory remedy of making the same application before the third respondent who is already dealing with the main dispute as the arbitrator. Even if I had felt inclined to grant the application on the merits I still would not have granted it for its lack of urgency.

I dismissed the application with costs on a higher scale. I awarded costs on a higher scale because this application was frivolous and a clear abuse of court process. It is an application that the applicant could have made before the third respondent who is already seized with the matter. The applicant was even aware of that remedy being available to it because it had even made an attempt to have the third respondent give it an assurance that he was not going ahead with the hearing on 16 February 2015. It did this by way of the letter of 12 February 2015. It even wanted him to do it unprocedurally without the first and the second respondent being notified and being

heard.

Zuze Tawanda Law Chambers, applicant's legal practitioners
Garabga, Ncube & Partners, 1st and 2nd respondents' legal practitioners