APPLEBIRD INVESTMENTS (PVT) LTD
versus
TENSAN INVESTMENTS (PVT) LTD
and
LI-DONG
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 6 and 13 April 2016

Urgent Chamber Application

S. Simango, for the applicant
K. Kadzere, for the 1st respondent
J. Ndomene, for the 2nd respondent

MUSHORE J: The parties appeared before me in Chambers to argue the matter after which I gave a full ruling. The applicant has approached me for my written reasons which follow.

The applicant was desirous of obtaining a stay of execution, it having realised that it would be evicted from the premises it was occupying at any time. Whilst presenting the applicant's case in chambers, Counsel for the applicant advised the court that the eviction was due to take place the very day that the matter was being argued in my chambers. For some reason or another, the applicant's counsel had misguidedly entertained the notion that because the matter had been set down urgently and almost immediately after it had been filed; it was safe to suggest that the court had recognized that it was in fact urgent. I say misguidedly because it should be usual for a court to immediately enrol urgent matters for hearing by observing the rules and dealing with such matters on an urgent basis. Thus in the ordinary course of the court's business the present matter was set down efficaciously as an urgent matter. Counsel is cautioned against inferring that an action which a court may make can (or could) infer a certain result as a certainty. Such inferences could lead to legal

practitioners being lulled into a false sense of security, particularly in instances where opposing papers are yet to be filed.

The facts are these.

The applicant subleased immoveable property known as 5 Jason Moyo Ave from the second respondent under a verbal agreement of lease. The second respondent on the other hand was the original lessee in that it had leased the property from its owner, that being the first respondent, under a written agreement of lease. In September 2013, the applicant assumed occupancy of the premises (or part thereof) under the verbal lease agreement it had with the second respondent and had enjoyed peaceful occupation for almost two years up until September 2015 when the first respondent filed an application for eviction of the first respondent and thereby the applicant. The applicant opposed the application and as is usual pleadings were filed back and forth until the 25th February 2016 when the first respondent managed to obtain default judgment. Upon discovering that the first respondent had obtained a default judgment, the applicant filed an application for rescission on 29 February 2016. The current application for an urgent stay of execution was filed recently on 5 April 2016; several weeks after the first respondent obtained the default judgment. Counsel for the applicant explained that when the reality of eviction became apparent, courtesy of a recent visit by the Deputy Sheriff with a notice of eviction, the applicant was spurred into action and applied for an urgent stay of execution which is the present matter.

The first respondent opposed the application and took issue with the urgency aspect. Counsel for the first respondent argued that the applicant ought to have applied for a stay of execution at the time that the applicant had applied for rescission. According to the first respondent therefore, the applicant could not expect the matter to be regarded as being urgent because as from the 25th February 2016 the applicant should have been aware of the likelihood of eviction. To that end counsel for the first respondent argued that the applicant had compromised its case on urgency by its delay in filing for the stay in execution. The first respondent's counsel referred to the *dicta* of Chatikobo J in *Kuvarega* v *Registrar-General and Anor* 1998 (1) ZLR 188 (H). The learned judge's comments are most apposite to the current case. At p 193 [E-F] Chatikobo J had this to say:

> "There is an allied problem of practitioners who are in the habit of certifying that a case is one of urgency when it is not one of urgency. In the present case the applicant was advised by the first respondent on 13th February 1988 that people would not be barred from putting on the T-shirts complained of. It was not until the 20th February that this application was launched. The

> certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not the imminent arrival of the day of reckoning; a matter is urgent, if at the time to act the need arises, the matter cannot wait. Urgency which stems from or deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there was a delay. In *casu*, if I had formed the view that it was desirable to postpone the election I may nevertheless have been dissuaded from granting such an order because, by the time the parties appeared before me to argue the matter, the election was already underway. Those who are diligent will take heed. Forewarned is forearmed" (My underlining)

In the present matter the need to act arose when the applicant became aware of the default judgment on 26 February 2016. The applicant would have or should have reasonably apprehended that the first respondent would execute on the strength of the default judgment. The applicant should have then applied for interim relief by way of an urgent stay pending finalisation of the application for rescission. However several weeks later, in fact on 5 April 2016, the applicant filed the present application when the day of reckoning became imminent. Further I was not favoured with an explanation for the delay from either the certificate of urgency and the supporting affidavit and it was only when I enquired as to urgency that counsel for the applicant explained that applicant had assumed that it wouldn't be necessary to apply for a stay earlier, because the first respondent ought to have known that the applicant wanted to remain in occupation of the premises by virtue of the fact that the applicant had applied for rescission of the default judgment. The explanation was unsatisfactory and naïve. The applicant has been spurred into reality by the imminent eviction. I am therefore satisfied that in the present matter, the urgency does indeed stem from a "negligent abstention to act".

Further on a *prima facie* assessment, applicant's prospects of success are bleak. The written lease agreement between the first and second respondent specifically prohibited sub-letting without the prior written permission of the first respondent first which written permission is non-existent. The applicant's case is founded on a potentially unlawful sub tenancy. Added to that, the sub tenancy agreement between the applicant and the second respondent is a verbal one. Thus there is no written agreement connecting the applicant to the premises. Further the fact that the eviction was due to take place whilst the matter was being argued, in itself presents an obstacle to the applicant being successful.

In the result, I uphold the point taken by the first respondent *in limine* that the matter is not urgent. Accordingly the matter is removed from the roll.

Nyikadzino, Simango and Associates, applicant's legal practitioners
Kadzere, Hungwe & Mandevere, 1st respondent's legal practitioners
Maposa, Ndomene & Maramba, 2nd respondent's legal practitioners