KELVIN MUSIMWA
versus
JOHNSON MUCHECHESI
and
ALTFIN INSURANCE COMPANY
and
THE SHERIFF HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 7 February and 18 February 2022

Urgent Chamber Application

Applicant, in person
T Nyamucherera, for first respondent

MUCHAWA J: This is an urgent chamber application for stay of execution. The interim relief sought is couched as follows:

> "Pending finalization of the case of rescission of judgment in case number HC 626/22 stay of execution be and is hereby granted and the third respondent is hereby interdicted to remove the attached goods in case number HC 4750/11. The second respondent shall bear costs of suit on legal practitioner-client scale."

The final order sought is as follows:

> "1. Stay of execution in case HC 4750/11 be and is hereby granted.
> 2. Second respondent shall pay costs of suit on a legal practitioner scale."

The brief background is that the applicant and the first respondent were involved in a road traffic accident on the 27th of June 2008. Under case HC 4750/11, the first respondent then issued out summons claiming damages for bodily injury. That action was defended with the applicant herein denying liability and lodging a counterclaim. The matter went up to pretrial conference stage, whereupon the applicant defaulted. His appearance to defend and plea were struck off and the matter was referred to the unopposed roll where the first respondent was awarded the equivalent in RTGS of US$82 500.00 at the official bank rate as damages. Thereafter a writ of execution was issued out and the Sheriff proceeded to attach the applicant's property on the 28th

of January 2022 prompting the applicant to file the current application which is opposed. At the hearing of the application, the first respondent raised three points in *limine*. I heard the parties and reserved my ruling. I deal with each point in turn below.

Whether the application is defective for want of proper form

Mr *Nyamucherera* submitted that an application such as this one should have been lodged in terms of r 60 (1) of the High Court Rules, 2021. The form to be used was said to be Form 23 as modified so that it can comply with Form 25. Such form, it was stated, should contain the grounds upon which the order is sought, should clarify the procedural rights due to the respondent such as the time and manner of filing any opposition and consequences of such failure. It was argued that r 60 is peremptory in nature and non-compliance with the provisions is fatal and that it was only in instances where there is some semblance of compliance that condonation can be extended to the non-complying party. The case of *Amalgamated Teachers Union of Zimbabwe v ZANU PF & ORS* HMA 36/18 was referred to argue that the form used by the applicant is completely alien to the Rules and cannot be salvaged.

The applicant submitted that the purpose of r 60 in prescribing the form to be used, is to ensure that the respondent's rights are protected so that a notice of opposition is filed and the respondent attends on the date of hearing. In this case it was argued that since the first respondent is represented by a legal practitioner who had filed a notice of opposition, there was nothing fatal in the form used. The grounds for the application are said to be evident from para 6 of the founding affidavit. It was argued that as there is no prejudice suffered, there is therefore no basis to hold that the form used is improper. In the event that the court finds that the form used is improper, the applicant urged the court to invoke its powers under r 7 and condone the departure from the Rules in the interests of justice.

In the case of *Veritas* v *Zimbabwe Electoral Commission & Ors* SC 103/20 the court was faced with an exact same situation where, however, a court application was in issue but the form used was not the peremptorily prescribed one. There was no attempt to give the respondents notice of what they were supposed to do if they intended to oppose the application. It did not state the *dies induciae* operating against the respondent for purposes of mounting any opposition. There was no attempt to include a summary of the basis upon which the application was being mounted, on the face of the application. It was found that the result was that the court would be left in doubt

as to whether the respondent had noted an opposition on time. As the appellants did not state why the application did not contain the proper form by way of notice, the application was found to be fatally defective. A similar approach was taken in the case of *Zimbabwe Open University* v *Madzombwe* 2009 (1) ZLR 101 (H).

This is an urgent chamber application. The applicant did not summarize on the face of the application, the grounds upon which the order is sought as required in Form 25. Though the procedural rights are not set out, I have extended an indulgence to the applicant as there is no evident prejudice suffered by the first respondent and in terms of r 7, I am condoning the departure from the rules in the interests of justice. This is because the first respondent was able to file his papers in opposition in time for the hearing and was able therefore to speak to the grounds upon which the order was sought. Consequently I find that the application is not fatally defective for want of form.

Whether the certificate of urgency is defective and if so, effect thereof

Mr *Nyamucherera* submitted that certificate of urgency in *casu* has failed to act as the *sine quo non* of this urgent application as it fails to establish the urgency of the matter by failing to consider all the fundamental principles which a court has to consider in an application for interim relief. Reference was made to the cases of *General Transport & Engineering and ORS* v *Zimbabwe banking Corporation (Pvt) Ltd 1998* (2) ZLR 301 and *Midkwe Minerals (Pvt) Ltd* v *Ziki & ORS* HH 219/15 on the purpose of a certificate of urgency and what the court must consider. It was argued that the deponent to the certificate of urgency had not canvassed the balance of convenience and irreparable harm and was therefore giving the court an incomplete opinion as substantive issues had been omitted and the court cannot therefore proceed to the merits. Another attack on the certificate of urgency is that in para 2 (b) there is an omission to include the case number for the application for rescission because it had not yet been filed as evidenced by the case number finally allocated which is HC 626/22 yet this case is HC 625/22 meaning that the deponent was dishonest in making reference to the application for rescission as already filed. Further, the allegations in paragraph relating to service of pretrial conference papers at the wrong address at 4 Lanark Road, Belgravia, Harare is alleged to have been improper service as Musimwa & Associates are alleged to have been operating from 42 Harveybrown, Milton Park as at 15 July 2021, are said to be unfounded if regard is had to the record.

The applicant submitted that there is nothing wrong with the certificate of urgency as it is a fact the application for rescission of judgment has been filed and served on first respondent's legal practitioners. The certificate of urgency is alleged to state that the urgency arose on the date of attachment of the property which was the 28th of January 2022. It was averred that the applicant was not aware of any judgment against him till that date. The applicant stated that the legal practitioner canvassed all issues in par 6 of the certificate of urgency.

In the case of *UZ-UCSF Collaborative Research Programme* v *Husaiwevhu & ORS* HH 260-14, the court had occasion to comment on the purpose of a certificate of urgency. MAFUSIRE J stated as follows;

> "A certificate of urgency in terms of r 244 is a condition precedent to an urgent chamber application being heard on an urgent basis. A legal practitioner, as an officer of the court, certifies the matter to be one of urgency. He or she does so from an informed position having carefully applied his or her mind to the matter. Even though the judge dealing with the matter will still decide whether or not the matter is urgent he or she is entitled to rely on the opinion of the legal practitioner who certifies the matter to be one of urgency. It is unethical and an abuse of the privilege bestowed on them as legal practitioners in this regard to mechanically certify matters as urgent without having properly applied their minds. They actually risk an adverse order of costs against themselves personally. However, the duty of the legal practitioner in this regard does not, in my view, extend to deciding or assessing the merits of the matter. That is the function of the judge."

In casu, the certifying legal practitioner stated that he had applied his mind to the matter and as applicant's goods had been attached on 28th January 2022 at 16.30 hours and removal of the goods was imminent, in pursuance of a court order in HC 4750/11, he believed the matter was urgent. He however does not provide a case number for the application for rescission but states it has been filed. The date of certification is given, I think erroneously, as 1 January 2022. As the application was filed on 1 February 2022, it must have been meant to reflect as 1 February. The application for rescission seems to have been simultaneously filed with the urgent chamber application and I believe nothing really turns on the current case having been allocated case number HC 625/22 whilst that for rescission was allocated HC 626/22. There is an averment that the application for rescission enjoys good prospects of success on the merits as the applicant was not aware of the pretrial conference papers which were wrongly served at 4 Lanark Road Belgravia which used to be Musimwa & Associates address of service but had changed as at 15 July 2021, such address is alleged to be 42 Harveybrown Milton Park Harare. He then urges the court to intervene to protect the applicant's rights and ensure he does not suffer irreparable harm.

It is my considered opinion that the certifying legal practitioner cannot in the circumstances, be said to have proceeded without applying his mind. He did not simply regurgitate what is in the founding affidavit. He provided enough detail to make the certificate of urgency valid so as to enable the judge to proceed to read the application and formulate own opinion on the urgency of the matter. This case is clearly distinguishable from that in *General Transport & Engineering (Pvt) Ltd* supra wherein there was a clear defect in the cause of action but a legal practitioner proceeded to certify the matter as urgent. The court held that such legal practitioner had not applied his mind and judgment to make a conscientious submission on the urgency of the matter. One cannot say the same in relation to this matter.

I find no merit in this point *in limine.*

Whether the matter is urgent

Mr *Nyamucherera* submitted that this matter is not urgent and is a typical example of one who waits for the day of reckoning to spring into action. This was said on the basis of the facts hereunder. That case HC 4750/11 was initiated in 2011 but the applicant never followed up adequately to ensure resolution of the matter. That despite various requests in setting up a pre-trial round table meeting, the applicant was not compliant. That despite proper service to attend a pre-trial conference at court, the applicant once again elected not to attend. That the applicant never notified the court or the respondent of his alleged change of address nor is there proof of such change of address. That the papers relating to the pre-trial conference attendance were served before 15 July 2021 as the initial court order was of the 7th of July 2021 and the matter was postponed, service duly done but there was no attendance. It was argued that the default was clearly calculated. Furthermore, it was submitted that the applicant admitted that he was guilty of causing the accident by paying an admission of guilty fine.

The applicant submitted that he only became aware of the order against him on 28 January 2022 and time should be reckoned therefrom particularly as he immediately sprang into action.

What constitutes urgency has been aptly set out in *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (HC):

> "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 can it be said that the applicant abstained from acting appropriately in case HC 4750/11 ultimately leading to the default order and then attachment? Would that be said to be evidence of the applicant having waited for the day of reckoning and not acting when the need to act arose? I have taken the time to peruse record HC 4750/11 as this was the only way to answer the above questions and it took a bit of time locating it. Having taken time to peruse this record whose pleadings span over a decade I will not detail everything which I found out but the significant details only. These are as follows;

1. The last pleading filed by the applicant in that matter was a notice of set down for pre-trial conference dates which was filed on 27 November 2013. In those pleadings, the applicant's legal practitioner's address is given as 4 Lanark Road, Belgravia, Harare.
2. There is no notice of change of address on record as was required in terms of Order 5 r 42C of the High Court Rules, 1971.
3. The first respondent's legal practitioners then wrote two letters to the applicant's legal practitioners on the 10th of May 2020 and on 12 April 2021, which were both duly served at the applicant's legal practitioners' address of record requesting a round table conference. When there was no response, the first respondent engaged the registrar, with proof of the failed attempts at having a round table conference.
4. Acting in terms of the rules the matter was set down for pre-trial conference before a judge for the 7th of July 2021. The return of service shows that the applicant was duly served on the 21st of June 2021at its address at 4 Lanark Road, Belgravia, Harare. The Honourable KWENDA J postponed the matter to the 15th of July and directed the Sheriff to conduct another service of the notice of set down at the applicant's address of service of record.
5. Service of the second notice of set down was duly effected on the 14th of July 2021. The applicant did not turn up for the second pre-trial conference, whereupon the judge struck off his appearance to defend and plea and referred the matter to the unopposed roll.

   In the certificate of urgency, the certifying legal practitioner states:

   "As an officer of the court, I am aware that as of 15 July 2021, Musimwa & Associates were now operating from 42 Harveybrown, Milton Park, Harare".

The applicant conceded that there was no notice of change of address filed on record in terms of the rules but referred to process served at the new address, albeit after the default

judgment. There appears to have been no follow up on the matter at all even when such other process was received in November 2021. The applicant was only jolted into action by the attachment of his property. For someone who had applied for a pre-trial conference date in 2013, who is a legal practitioner and was represented to have imagined that the matter would just fizzle out and not be dealt with in terms of the Rules, would be fanciful thinking. The applicant had all the time to follow up and act by providing a new address. He did not. He seems to have made a conscious election to do nothing, well knowing the consequences of such a choice. The conduct of the applicant falls squarely into what is referred to in the *Kuvarega* supra case:

> "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."

It is my finding that this matter is not urgent. It is no longer necessary to consider the propriety of the order sought. I accordingly strike this matter off the roll of urgent matters, with costs following the cause.

Lawman Law Chambers, first respondent's legal practitioners