PARADISE INVESTMENTS PVT LTD

Versus

SOLOMON MATSA

And

INDUCTOSERVE PVT LTD

And

THE OFFICER IN CHARGE ZRP SHURUGWI N.O.

And

DEPUTY SHERIFF GWERU N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 23 JUNE 2021 & 1ST JULY 2021

Urgent application

T. Kamwemba, for the applicant
H. Garikayi, for the 1st and 2ndrespondents

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 18th June 2021. It was placed before me and I directed that it be served on the respondents together with a notice of set down for 23rd of June 2021. The application is opposed by the 1st and 2nd respondents. 3rd and 4th respondents did not file opposing papers and did not participate in this hearing. I understand their position to be that they are content to abide by the order of this court, whatever it is. Applicant seeks an order couched in the following terms:

Terms of the final order

a. That the 1st and 2nd respondents be and is (*sic*) hereby ordered to restore applicant with possession and ownership of the Brick moulding machine, steel shade and two generators.

b. The 1st and 2nd respondent *(sic*) be and is hereby ordered to stop prohibiting applicant from vacating Plot 20, Sebanga Road, Shurugwi with their property being a Brick moulding machine, steel shade and two generators.
c. Failure by the 1st and 2nd respondents to comply with the order, the Zimbabwe Republic Police to dismantle and take possession of the steel shade, brick moulding machine and the two generators.
d. That the respondents pay costs of this application on an attorney and client scale, one paying the other to be absolved.

Interim relief sought

1. That pending the finalisation of this matter applicant is granted the following interim relief:
    a. That the 1st and 2nd respondent (*sic)* be and is hereby ordered to immediately upon being served with this order to desist from removing, using and dismantling the brick moulding machine, steel shade and the two generators at Plot 20, Sebanga Road, Shurugwi.

Service of this application and provisional order

That the service of the urgent chamber application and the provisional order will be (*sic)* through the Deputy Sheriff Gweru or applicants' legal practitioners or their clerk.

Background

This application will be better understood against the background that follows. 1st and 2nd respondents are the owners of an immovable property known as number 20 Sebanga Road, Shurugwi (property). The respondents had a lease agreement with applicant in respect of the property. A dispute arose, in the main respondents contending that applicant was not paying rent, and had fallen into arrears. It appears from the papers before court that at some point respondents evicted applicant without following due process. On the 27 May 2021, the Magistrates Court, sitting in Shurugwi, issued an interdict, prohibiting respondents from evicting applicant from the property without a court order. The papers show that on the 1st June 2021, the lease agreement was terminated, and applicant has vacated the property. On

vacating the property applicant was prohibited by the respondents from removing a brick moulding machine, two generators and a steel shade. Both parties claim ownership of the machinery and the steel shade. It is the dispute of ownership of this property that has been escalated to this court. Applicant the filed this application, headed "urgent application for *re vindicatio* action."

Other than resisting the relief sought on the merits, respondents took a point *in limine* which was also a subject of argument in this matter. It was that contended the certificate of urgency is invalid and the application is not urgent.

Ad points *in limine*

At the commencement of this hearing I informed counsel that in this case I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on preliminary points despite that they were argued together with the merits. See: *Mokhosi & 15 others V Justice Charles Hungwe & 5 Others* (Cons Case No/02/2019) [2019] LSHC 9 (02 May 2019). I now deal with the point *in limine.*

The 1st and 2nd respondents contend that this application is not urgent. It is further contended that the certificate of urgency itself is invalid. It was argued that this court must strike it off the roll without delving into the merits. In relation to urgency this court looks at the certificate of urgency to establish whether the application is indeed urgent. In *Chidawu & Others v Sha & Others* SC 12/13 the Supreme Court held that the Certificate of Urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In making a decision as to the urgency of the application a judge is guided by the averments in the certificate of urgency. In this application the certificate states thus:

Certificate of urgency

> I the undersigned, Kutendaishe MANIKA, do hereby state that I am a duly registered legal practioner of this honourable court practicing in the firm styled Jumo Mashoko and partners of Chilaw Chambers, 7th street, Gweru.
>
> 1. I have perused and considered this application,

2. The 1st and 2nd respondents have evicted the applicant from plot 20, Sebanga road, in Shurugwi but is prohibiting them from removing their machinery in particular the brick moulding machine, two generators and steel shade they erected on the premises.
3. The 1st and 2nd respondents are claiming ownership of the property which belongs to the applicant without any valid reason for doing so.
4. The applicant has made out a very strong prima facie case of undisturbed possession and ownership of brick moulding machine, two generators and steer shade with an estimated value of USD$200 000 American dollars.
5. As such it is imperative that the 1st and 2nd respondents be ordered to desist from taking the law into their own hands by removing the applicant's machinery from the premises or using the machinery for their own personal gain.
6. If this is not done, the applicant stands to lose his valuable machinery and also business to the 1st respondent and 2nd respondent illegal acts.
7. The court is implored in this regard to take judicial notice of the presently volatile economic environment which makes it difficult for the applicant to recover lost business and also property.
8. Accordingly, any damages suffered by the applicant be it pecuniary or otherwise would be extremely difficult if not impossible to calculate.
9. The 1st and 2nd respondents' conduct is not only causing harm to the applicant finances but also tarnishing their brand in retailing bricks as they are able to honour orders and also manufacture bricks as the 1st and 2nd respondents have taken over their business.
10. The inconvenience and hardship being suffered by the applicant is for no reason as the applicant has settled all the arrear rentals and the 1st and 2nd respondents have indicated to the applicant that they will not accept any future rentals from them.
11. When regard is heard to the fact that the applicant has been put out of business by the 1st and 2nd respondents acting as if they are the law, it becomes clear that an urgent hearing is a necessity to avoid bloodshed as the security mafia hired by the 1st and 2nd respondent have vowed that applicant will not remove anything from the premises.
12. The applicant has no other remedy available to them at law as the 4th respondent are hesitant to come to their assistance as the 1st and 2nd respondent are also claiming ownership of the property owned by the applicant.

13. The balance of convenience inclines in favour of this application. The 1st and 2nd respondents have nothing to lose but gain from their illegal conduct.
14. It just and imperative that this application be heard on the basis of cogency so that the harm apprehended by the applicant and bloodshed in recovering their property be avoided.

    Wherefore, l implore that the matter be so heard on an urgent basis.

This court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by its rules. It is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega* v *Registrar General and Another*1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27.

The leading case within this jurisdiction in relation to urgency is *Kuvarega v Registrar General & Anor* (*supra*), a judgment by CHATIKOBO J. The learned judge had the following to state at p 193F-G.

> 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 deadline draws near is not the type of urgency contemplated rules. It necessarily follows that the certificate of urgency or supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.

In assessing whether an application is urgent, the courts have in the past considered various factors, including, among others: the consequence of the relief not being granted;

whether the relief would become irrelevant if it is not immediately granted; and whether the urgency was self-created. See: *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2019] ZACC 27. Further to pass the urgency test, applicant must show that there is an imminent danger to existing rights and the possibility of irreparable harm. See: *General Transport & Engineering (Pvt) Ltd &Ors* v *Zimbank*1998 (2) ZLR 301;*Document support Centre (Pvt) Ltd* v *Mapuvire*2006(1) ZLR 240 (H); *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002; *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In the certificate of urgency, it is averred that 1st and 2nd respondents have evicted the applicant from Plot 20, Sebanga road, in Shurugwi but they are prohibiting applicant from removing its machinery i.e. brick moulding machine, two generators and steel shade. Respondents contend that applicant has not disclosed to this court that it has always been aware that upon vacating the property it shall be prohibited from removing the listed items. 1st and 2nd respondents make the point that the dispute about the machines has been going on from the time the parties had a dispute concerning rentals. This is said to have been in January 2021. Further it is said at a meeting held on the 31st May 2021, at Dzimba, Jaravaza and Associates, Gweru the issue of the brick making machine and generators remained outstanding and was not resolved. It is argued that the urgency is self-created and contrived. The fact that applicant has paid arrear rentals and moved out of the premises does not make this matter urgent.

There is no explanation on why applicant did not act timeously, i.e. in January 2021, when it became aware of the dispute about the ownership of the machines. This application was only filed on the 18th June 2021. For this application to be heard as urgent applicant had to explain what circumstances had arisen after January 2021, to justify the need to have the matter dealt with on an urgent basis. The period of inaction has been approximately six months, it had to be explained. It has not been explained. The matter cannot be permitted to jump the queue on the court roll just because applicant had chosen to act at its own time and pleasure. The gap between the time when the cause of action arose and the filing of this application is too great to consider this application as urgent. When the applicant, who is seeking the indulgence of this court has created the emergency through its culpable remissness or inaction, it cannot succeed on the basis of urgency.

Again in the certificate of urgency, it is contended that it is just and imperative that this application be heard on the basis of urgency so that the harm apprehended by the applicant and bloodshed in recovering their property be avoided.*(Sic)*. Further this threat of bloodshed appears on the face of the chamber application, it is said applicant is fearful of bloodshed if they are to hire security guys to help them in removing their property being a brick moulding machine, two generators and a steel shed. Again this threat of bloodshed was repeated by counsel in his oral submissions. He implored the court to take judicial notice of the fact that Shurugwi is a centre or epitome of violence. The net effect of his submission is that should applicant fail to get an order from this court, it will resort to self-help, and violence might erupt in the process, leading to bloodshed.

The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 recognises the supremacy of the rule of law as one of the core values upon which the State is founded. The threatof bloodshed and violence is anathema to the rule of law. It is unacceptable. It has no place in a civilised society. It cannot come from the mouth of a legal practitioner of this court. It cannot come from a litigant who is seeking relief from this court. It cannot be in a certificate of urgency signed by a legal practitioner of this court. It cannot be in papers filed with this court.It cannot be anywhere near this court. I consider applicant's threats of violence and bloodshed as an attempt to employ improper pressure on this court to accede to the order it seeks. It is an improper pressure that, if permitted will undermine the rule of law. This court will ignore and not factor into the equation such improper pressure.

1st and 2nd respondents contend that the certificate of urgency is invalid. It was held in *Chidawu & Others v Sha & Others* SC 12/13, that in order for a certificate of urgency to pass the test of validity it must be clear *ex facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute. In*casu*, the certificate of urgency speaks to applicant's alleged ownership of the brick moulding machine, the generator and the steel shed. Even in the founding affidavit, the averment is that both parties have tried to negotiate a peaceful resolution of the ownership wrangle without success. This certificate of urgency does not speak to urgency. It does not speak to the requirements of urgency. The fact that applicant is the alleged owner of the machinery cannot be the trigger to urgency. The fact that applicant is losing business cannot be a trigger of urgency. It cannot create an emergency. I take the view that the legal

practitioner who signed the certificate of urgency did not apply his or her mind to the facts of the case before certifying the matter as being urgent.

In conclusion, the fact that applicant owns the machinery in dispute cannot be a cause of urgency. The fact that applicant is losing business because it does not have possession of its machinery cannot be a cause of urgency. It cannot create an emergency. This is not the kind of urgency anticipated by the rules of court. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be removed from the roll with an appropriate order of cost.

Ad Costs

Respondents seek costs on the scale of legal practitioner and client. Such costs are not merely for the asking. A litigant who desires his opponent to be mulct with punitive costs must make a proper motivation for such costs. To merely aver in the opposing affidavit that the application must be dismissed with costs on a legal practitioner and client scale is inadequate. Such costs are awarded when a court wishes to mark its disapproval of the conduct of a litigant. See: *Davidson v Standard Finance Ltd* 1985 (1) ZLR 173 (HC); *Public Protector v South African Reserve Bank* [2019] *ZACC* 29;*Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC). A punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke. See: *Khumalo v Victoria Falls & Anor* 2018 (1) ZLR 232 (H); *CRIEF Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd &Ors*2018(1) ZLR 1 (H); *De Lacy v South African Post Office* [2011] ZACC 17; 2011 JDR 0504 (CC); 2011 (9) BCLR 905 (CC) at *paras* 116-7 and 123. I take the view that this is not a case where applicant should be penalised with costs on a legal practitioner and client scale, though its threat of violence and bloodshed is reprehensible.

Disposition

In the result, I make the following order:

1. The point *in limine* on urgency is upheld.
2. This application is not urgent and is removed from the roll of urgent matters with costs of suit.

Tavenhave and Machingauta Legal Practitioners, applicant's legal practitioners
Garikayi& Company, respondent's legal practitioners