APOSTOLIC FAITH MISSION IN ZIMBABWE
versus
APOSTOLIC FAITH MISSION OF ZIMBABWE
and
AMON NYIKA CHINYEMBA
and
CAESAR MAGWENTSHU
and
DENNIS MUTUNGI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 & 13 April 2022

URGENT CHAMBER APPLICATION

Miss F. Mahere, for the applicant
CW Gumiro, for the respondents

ZHOU J: This is an urgent chamber application for a *mandament van spolie*. The applicant's case is that the respondents unlawfully dispossessed it of the property known as Stand Number 164D, Northway, Prospect, Waterfalls, Harare. The application is opposed by the respondents who have objected to the hearing of the application on an urgent basis. This judgment is in respect of the question of urgency. The background facts which are material to the determination of this preliminary objection are as follows:

The second, third, fourth and fifth respondents are former members of the applicant. After leaving the applicant following certain disputes which are not material for the purposes of this application, they became members of the first respondent. The allegations on the papers are that these respondents together with others who are not cited in this application actually established the first respondent. The parties subsequently got embroiled in litigation.

On 8 April 2022 the applicant instituted an urgent chamber application to interdict the same respondents from using the property described earlier on to conduct their conference which was scheduled for 8 – 10 April 2022. The urgent chamber application was filed under case number HC 2405/22. I heard that application and struck it off the roll of urgent matters for want of urgency

on 9 April 2022. A few hours later, precisely on 10 April 2022 just after 1300 hours, the applicant instituted the instant application. The complaint *in casu* pertains to the same immovable property, 164D Northway, Prospect, Waterfalls, Harare. More significantly, the instant application is predicated upon the same facts as in HC 2405/22, in that both applications pertain to the alleged unlawful use by the respondents of the said property. It seems to be common cause that the property belongs to the applicant. Unlike case number HC 2405/22, the cause of action *in casu* is not for an interdict but is, as mentioned earlier on, for a *mandament van spolie*.

When the application was filed the certificate of urgency which accompanied it stated that the need to act arose on 10 October 2021 and that the application had been prepared by 12 October 2021. The certificate of urgency itself was dated 10 April 2021. Having been alerted to the prospect of an objection to the urgent hearing of the matter on account of the time taken to act from the dates stated in the certificate of urgency, the applicant hurriedly pulled out the page which had the 8th and 10th October 2021 from the record. It replaced it with a page that stated 8 April 2022 as the date when applicant became aware of the acts being complained of, and 10 April 2022 as the date when the application was prepared. Only the copy of the certificate of urgency in the court record was attended to. The respondents were not furnished with the page of the certificate changing the dates. Even then, the new page inserted showed that it was signed at Harare on 10 April 2021. Inevitably, the respondents in their opposing affidavit based their objection to the urgent hearing of the matter on the original certificate of urgency. At 10:00 a.m. when the matter was scheduled to be heard the applicant moved a postponement of the matter to enable the legal practitioner who prepared the certificate of urgency to rectify the certificate. The request was acceded to notwithstanding opposition thereto, and the matter was stood down to 2:30 p.m.

At the resumption of the hearing the applicant filed an "Amended Certificate of Urgency" as well as an amended draft order. The leave to file these two documents was sought by counsel. The respondents objected to the filing of these documents. After hearing argument, I took the view that since the outcome of my decision with respect to the objections would not dispose of the matter one way or the other, my decision on the objections would be contained in the final judgment.

The amended Certificate of Urgency

The applicant explained that the dates stated in the original certificate were a result of a typographical error. On the other hand, the respondents stated that they had prepared their opposing affidavits based on the certificate urgency as presented to them. While I note that there was indeed a measure of tardiness involved, it is clear that the dates stated could only be erroneous. The certificate of urgency mentioned in the first paragraph that the lawyer who prepared it had considered the contents of the founding affidavit and the annexures thereto. These documents relate to 2022 events, which means that there was clearly a misstatement of the dates. The fact that the respondents had already prepared their opposing affidavit based on that certificate is a challenge that would have been resolved by the filing of a supplementary affidavit. When I stood down the hearing of the matter to 2:30 p.m. I also granted the respondents leave to file a supplementary affidavit to respond to the applicant's papers as amended if they so wished. They elected not to file any supplementary affidavit. In the premises, the objection to the filing of the amended certificate of urgency is dismissed.

The amended draft order

The objection to the filing of the amended draft order was on the ground that the respondents filed their opposing affidavit on the basis that what was being sought was a provisional order and that the matter would still be set down for the confirmation or discharge of that order. They therefore alleged that they would be prejudiced by the filing of an amended draft order seeking final relief. The applicant, through counsel, submitted that an order in spoliation proceedings is by its very nature final in effect. Thus, even the provisional relief which was being sought was final in its effect even though it was still subject to confirmation.

The respondents, if they needed to amend their opposing papers to deal with the proposed amendment to the draft order, would have asked for time to file a supplementary affidavit. They did not do so. Also, there is no real prejudice which is occasioned by the filing of the amended draft order since its substance is for a *mandament van spolie*, which is what the application is all about. The interim relief in the draft provisional order was, in fact, misplaced since it is for an interdict. For these reasons, too, the objection to the filing of the amended draft order is dismissed.

Whether this application is urgent

Turning to the question of the urgency of the application, the applicant essentially made two points. The first point made is that spoliation proceedings are generally to be treated as urgent matters. The second point is that the applicant only became aware of the act of spoliation on 8 April 2022, and acted within two days by filing the application on 10 April 2022. The respondents advanced the argument that at the time of preparing the application and filing it, the applicant was aware from the advertisements attached to the founding affidavit that the conference was a two day event which would start on 8 April 2022 and end at 1300 hours on Sunday 10 April 2022. The failure to file the application before the scheduled time of the conference ended therefore deprived the matter of its urgency. The second point made on behalf of the respondents was that as a matter of fact the conference had ended prior to the filing of the application and the first respondent's members were certainly not in occupation of the conference centre at the time of the hearing.

The principles applicable where the question of urgency arises in any urgent chamber application are settled in this jurisdiction, and have been espoused in a welter of cases, see *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H); *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 116-98 at p 1; *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H) at 193 F-G; *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232 (H) at 242G-243A. In the *Kuvarega* case, (*supra*), at 193F, CHATIKOBO J in an *obiter dictum* that has been quoted in many cases 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".

In the case of *Dilwin Investments (Pvt) Ltd* (*supra*) at p 1, GILLESPIE J, emphasized that a party who institutes proceedings through the urgent procedure is essentially seeking preferential treatment from the court in that he or she or it is seeking to jump the long queue of other applications waiting to be heard. For this reason, the court expects such a litigant to act expeditiously having regard to when the need to act arose. In dealing with this need to act expeditiously in the *Kuvarega* case, the court held that urgency which stems from deliberate inaction until the event complained of materializes is not the sort of urgency for which the rules extend the preferential treatment of an urgent hearing. If a party waits until the eleventh hour the court will not drop down everything to attend to the self-inflicted urgency.

The submission that spoliation proceedings are generally dealt with on an urgent basis is indeed correct. However, even in spoliation proceedings, the applicant is still enjoined to satisfy the other requirements in accordance with the principles set out earlier on. In other words, if a party fails to act expeditiously having regard to when the need to act arose, the court can still decline to hear the matter on an urgent basis. Thus, it is not the cause of action *per se* which clothes a matter with the attribute of urgency but the circumstances of the case.

In this case the respondents have stated that the conference which gave rise to the instant application ended at 1300 hours on 10 April 2022. The persons who were at the conference venue which is the property subject to the instant application vacated it. The applicant was aware from the annexures to the application that the conference in question was scheduled to end at 1300 hours on 10 April 2022. No evidence has been tendered to contradict the evidence that at the time that the application was filed the property was no longer occupied. It is not sufficient, as was done by the applicant's counsel, to merely state in argument that she disputed that the first respondent's members had left the place by the time that the application was filed. There was no evidence in the form of an answering affidavit to disprove the respondents' assertions. The position of the law in this respect is settled, as was stated by MCNALLY JA *in Fawcett Security Operations (Pvt) Ltd* v *Director of Customs & Excise & Others* 1993 (2) ZLR (2) ZLR 121(S) at 127F:

"The simple rule of law is that what is not denied in affidavits must be taken to be admitted".

There is a catena of cases in which this principle has been repeatedly stated, see *Minister of Lands & Others* v *Commercial Farmers Union* 2001 (2) ZLR 457 (S) at 494 C-D; *Shumba & Anor* v *ZEC & Anor* 2008 (2) ZLR 65 (S) at 70G-71A; *Chindori-Chininga* v *National Council for Negro Women* 2001 (2) ZLR 305 (H) at 308H - 309A. The urgency of the matter was therefore lost when the respondents ceased to be in possession of the property which is the subject of the mandament.

Significantly, the applicant makes no attempt to explain why the proceedings were not instituted before 10 April 2022 yet, on its own papers, it states that it became aware of the act of spoliation on 8 April 2022. There seems to be a misconception that because the delay was of only two days then the urgency was self-evident. That is not so. The court does not engage in a mathematical exercise to count days from the day when the act complained of arose up to the day that the application was instituted. The court looks at the totality of the facts and circumstances

of each case holistically. In other words, in one case a delay of even a day or two may deprive a matter of its urgency while in an appropriate case a delay of even a month or more may not necessarily deprive a case of its urgency. Whether or not urgency is established in any case will depend on all the circumstances of the case.

The measured omission by the applicant to explain the delay is, indeed deliberate. Clearly, the instant application was only instituted following the striking off the roll of case number 2405/22. The less than tidy manner in which the papers were hurriedly prepared, resulting in the mixing up of dates in the certificate of urgency makes this position clear. As noted earlier on, even the provisional order which was filed when the application was filed was in the form a prohibitory interdict notwithstanding the presentation of the application as one for a *mandament van spolie*. It was not for restoration of possession. In all the circumstances, this matter does not qualify for an urgent hearing.

In the result, the matter is struck off the roll of urgent matters with costs.

Dube-Tachiona & Tsvangirai, applicant's legal practitioners
Moyo Chikono & Gumiro, respondent's legal practitioners