

DOUGLAS NDLOVU
versus
THABO MASUKU

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 15 JULY 2016 AND 8 SEPTEMBER 2016

Urgent Chamber Application

Z Ncube for the applicant
R Moyo-Majwabu for the respondent

TAKUVA J: Applicant filed what he termed an “Ex-Parte Chamber Application”, on 24 June 2016 praying for a spoliation order on the basis that respondent has unlawfully occupied plot number 14 and erected a fence on the boundary of the said plot.

The facts are that the applicant was offered subdivision 13 of Richardson Farm in Umguza district of Matebeleland North province by the Minister of State for National Security, Lands, Land Reform and Resettlement in the President’s office on 12 January 2009. The farm is approximately 300 hectares in extent. Respondent meanwhile was offered by the same authority subdivision 14 of Richardson A in Umguza District of Matebeleland North Province for agricultural purposes. The farm is approximately 100 hectares in extent.

However, applicant in his founding affidavit states that he was allocated a plot in the year 2000 at Richardson Farm. He claims he obtained an offer letter which he marked “A” but in actual fact he did not attach any Annexure A. He further claimed that the same plot was increased from “100 hectares to 300 hectares”, in 2005 and that this plot is known as “plot number 14 on paper but 9 on the ground.” According to him, respondent “voluntarily moved out of his plot 14 on paper but number 9 on the ground.”

Applicant alleged that respondent came to the farm on an unspecified date and dumped old tyres on applicant’s yard. Later, it is alleged applicant erected a fence around “a portion of the farm”, effectively condoning off this area.

Finally applicant contended that he firstly was in peaceful and undisturbed possession of the property and secondly that the respondent dispossessed him forcibly or wrongfully of the property.

Respondent on the other hand opposed the application on the following grounds:

- (a) The matter is not urgent in that applicant does not state in his founding affidavit when he was allegedly despoiled of possession of plot 14. The certificate of urgency it was contended has been affected by the same malady.
- (b) On the merits it was argued that firstly, applicant was never in peacefully and undisturbed possession of the farm and secondly, that logically flowing from the first point, respondent did not deprive applicant of the possession forcibly or wrongfully in that respondent has always been in occupation of his farm, despite applicant's incessant and unjustified claims of ownership of subdivision 14.

There are two issues for consideration. The first is whether this application is urgent. The second is whether applicant has satisfied the requirements of a spoliation order.

As regards the first issue the starting point is r244 of the High Court Rules 1971. It states;

“Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.” (my emphasis)

In *Kuvarega v Registrar-General and Another* 1998 (1) ZLR 188 (H) CHATIKOBO J remarked;

“Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is also 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 by the

rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action.” (my emphasis)

The matter was recently succinctly put by MALABA DCJ while dealing with what should be set out in a founding affidavit and certificate of urgency in *Mayor Logistics (Pvt) Ltd v ZRA* 2014 (2) ZLR 78 (c) as follows;

“A party seeking to be accorded such preferential treatment must set out in the founding affidavit facts which distinguish the case from others to justify the granting of the order for an urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.”

It is trite that generally an application for spoliation order should be dealt with on urgent basis – *Gifford v Muzire and Others* 2007 (2) 131 (H). It is also accepted that where a situation has existed for a significant time before an application is mounted such an application will be deemed not urgent. See *Gwarada v Johnson and Others* 2009 (2) ZLR 159 (H) where the court remarked thus;

“Urgency arises when an event occurs which requires contemporaneous resolution the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat.”

In an urgent application the applicant must act with the utmost good faith and lay all relevant facts before the court – *Bulawayo Dialogue Institute v Matyatya NO and Others* 2003 (2) ZLR 79 (H), *Grasprak Investments (Pvt) Ltd v Delta OPS (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H). Further, urgency need not only be established, but the applicant himself must have treated the matter as urgent *Madzivanzira and Others v Dexpoint Investments (Pvt) Ltd and Another* 2002 (2) ZLR 316 (H).

Applying these principles to the facts in *casu*, I find it extremely difficult to conclude for a number of reasons, that this application is urgent. Firstly, applicant does not, in his founding affidavit state when he was despoiled. The certificate of urgency signed by a legal practitioner is also silent on this crucial point. I say this is a crucial issue because of the chequered history of the parties. It is common cause that the parties are embroiled in a running legal battle that started in 2015 under cover of case number HC 920/15. It spilt into 2016 under cover of case number HC 1457/16. Both cases are pending determination. Case number HC 920/15 was referred to

trial on 31 May 2016. Consequently, it becomes totally meaningless in my view, for applicant to simply file an urgent application on 24 June 2016 for a spoliation order without specifically stating when the conduct he is complaining about occurred. How is a court expected to ascertain the urgency of such an application. How is it possible to assess whether the applicant has acted timeously or not in the absence of a precise and specific averment on when he was dispossessed of the property. Secondly, applicant in my view, has not made a full disclosure of all material facts in that he has dishonestly concealed material facts. For example, he refers to plot 14 as his plot when in actual fact it is not his plot. Let me reproduce portions of his founding affidavit in order to illustrate the points I am making. In Paragraph 5, he gives the background as follows'

“5. I was allocated a plot in the year 2000 at Richardson Farm. I annex here to and mark ‘A’ a copy of the offer letter.”

What should be noted is that he does not indicate the plot number and the so-called offer letter is not annexed at all.

“6. In 2005, the plot was increased from 100 hectares to 300 hectares as I was carrying on successful farming activities. The extension was approved by all the relevant bodies. However, the Minister of Lands and Rural Resettlements did not regularize the change in boundaries.

7. I have been in occupation of my plot with shifted boundaries for the past 15 years. The plot number is 14 on paper but 9 on the ground.

8. Meanwhile, the respondent voluntarily moved out of his plot 14 on paper but number 9 on the ground. This has been obtaining for the 15 years and either party has been in occupation without any disturbance or interference from the other.”

No documentary proof whatsoever has been attached in support of the averments in paragraph 6 in respect of “shifted boundaries.” Also, the apparently confusing and meaningless phrase “plot 14 on paper but 9 on the ground” has been left unexplained. Instead, applicant claims that plot 14 is his. This in my view, is when the element of dishonesty comes in because the undisputed facts are that applicant was offered plot 13, while respondent was offered plot 14 of the same farm. For some reason, applicant has made overtures to the relevant authorities for permission to own plot 14. This quest has triggered numerous legal disputes between the parties.

In paragraph 9 of his founding affidavit, applicant states:

- “9. On 10th April 2015, the respondent caused to be issued undercover of case number HC 920/15, summons against myself wherein he claimed an order declaring that he is the lawful owner of plot 14. I defended that matter through my legal practitioners of record and the matter reached pre-trial conference stage wherein the Hon. Mr Justice MATHONSI referred the matter to trial.
10. Pending the determination of that matter, the respondent has in his wisdom seen it fit to attend to the farm I am occupying and wreak all manner of havoc.
11. Initially he came with old tyres and dumped them in my yard.
Later, he was to return and erect a fence around a portion of the farm and resultantly condone off the area making it inaccessible to me.” (my emphasis)

Quite evidently, the applicant has not divulged when respondent allegedly “attended to the farm” or erected the fence. The use of words like “initially” and “later” are so vague that they tempt the court to venture into speculative mode. I am aware that applicant has filed what he called an “answering affidavit” in which he rather belatedly stated that he was despoiled on 12 June 2016. In my view, the applicant’s case must stand or fall on the basis of the affidavits. In *casu*, the founding affidavit and the certificate of urgency do not give the dates nor the plot in issue. Allowing an answering affidavit in this case would seriously prejudice the respondent in that it deprives the respondent of an opportunity to deal with those issues. An answering affidavit is provided for in court applications in r234 of the rules and not in chamber applications. In terms of r235, after an answering affidavit has been filed no further affidavits may be filed without the leave of a court or a judge. I take the view that a cause of action must be set out in the founding affidavit. It is improper to raise new matters in an answering affidavit. See *Magwiza v Ziumbe No and Another* 2000 (2) ZLR 489(S).

Further, applicant filed his answering affidavit after the respondent had filed his heads of argument. The applicant did not seek leave of the court to file the answering affidavit. This is undesirable and irregular. See *Magurenje v Maphosa and others* 2005 (2) ZLR 44 (H). The fact of urgency must appear from the founding affidavit, and where no such averment is made in that affidavit, there will be no legal basis for a legal practitioner to issue a certificate of urgency as that certificate is in turn based on the founding affidavit. Logically, if there is no valid certificate of urgency then rule 244 has not been complied with.

HB 233-16
HC 1572-16
XREF HC 1457-16
XREF HC 920-15

In *Econet Wireless (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe* 2014 (2) ZLR 693 (H), DUBE J remarked that;

“A certificate of urgency is required to be premised on a founding affidavit. ---- A legal practitioner cannot certify a matter as being urgent where the applicant itself does not hold the view that the matter is urgent. The founding affidavit must disclose urgency. The deponent to the founding affidavit should therefore be alive to the fact that he is bringing a matter to court on an urgent basis. It is incumbent upon him to articulate fully in his affidavit, why he is bringing the matter on an urgent basis and why he cannot wait and enroll the matter on the ordinary roll. He cannot simply regurgitate the history of the matter and expect that he may persuade the court to find the matter urgent by merely outlining the irreparable harm likely to ensue. He must make specific averments on the allegation that the matter is urgent and cannot wait. --- Nor can the deponent to the founding affidavit leave it to his counsel to address the issue of urgency of the matter at the hearing either ---.”

In *casu*, both the founding affidavit and the certificate of urgency are woefully inadequate. For these reasons, I come to the conclusion that the applicant has failed to establish urgency in this matter. Accordingly, it is ordered that;

1. The application is not urgent.
2. The applicant shall pay costs of this application.

Ncube and Partners, applicant’s legal practitioners
James, Moyo-Majwabu and Nyoni, respondent’s legal practitioners