

SEVENTH DAY ADVERTIST ASSOCIATION OF SOUTHERN AFRICA

Versus

PHANSON TSHUMA

And

CIVIL SERVICE COMMISSION

And

MINISTER OF PRIMARY AND SECONDARY EDUCATION N.O.

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 29 SEPTEMBER & 1 OCTOBER 2020

Urgent chamber application for *rei vindication*

DUBE-BANDA J: This matter came to this court as an urgent chamber application. In the papers filed with this court, applicant sought a final order drawn in the following terms:

1. That 1st respondent and all those claiming occupation through him shall vacate the applicant's premises known as Number 1, Solusi Adventist High School within 48 hours of the granting of this order.
2. Failing paragraph (1) above, the Deputy Sheriff, Bulawayo or his lawful assistants are authorised and directed at 1st respondents own expense, to evict the 1st respondent and all those claiming through him, from Solusi Adventist High School.
3. The 1st respondent shall pay costs on an attorney and client scale.

In the certificate of urgency, signed by a legal practitioner in terms of rule 242 (2) (b) of the High Court Rules, 1971 (Rules) it is alleged that:

1. The applicant has real rights of ownership of the property which rights are enforceable against the whole world. The real rights of ownership establish a clear right from a substantive area of law.
2. The 1st respondent remains in occupation of the applicant's house without applicant's consent and this is causing applicant unnecessary prejudice. All the plans for the re-

opening of the schools are hamstrung as there is an accommodation crisis created by the refusal of the 1st respondent to vacate the applicant's house. Schools are opening on the 28th September 2020 leaving the applicant with less than seven (7) days to carry out all intended works.

3. Save self-help, the applicant has no other efficacious remedy to grant relief and protection of its rights.
4. Having considered the decision in *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H), I take the view that the matter is urgent and it cannot wait on the queue.
5. Since the applicant seeks a final interdict I also considered the decision in *Universal Merchant Bank Zimbabwe v The Zimbabwe Independent and Anor* 2000 (1) ZLR 34 and I am of the view that the requirements are established.
6. I have also considered the comments by the Honourable CHITAPI J in the case of *Machaya and 7 Ors v The State and Anor* HH 442/19, as to the form of the order.

According to a notice filed with this court on the 25th September 2020, 2nd and 3rd respondents indicated that they are not opposed to the relief sought by the applicant, save for the issue of costs. Again, according to a letter dated 28th September 2020 (quoted in *extensioinfra*), and the submissions made by Mr *Dube* (counsel for 1st respondent) in his oral submissions, it is apparent that 1st respondent has vacated the applicant's premises known as Number 1, Solusi Adventist High School (house). His opposition turns on the issue of costs.

Background

The background of this matter appears within the four corners of the founding affidavit filed in support of this application. What is clear is that 1st respondent is employed by the Ministry of Education. He has been the headmaster of Solusi Adventist High School (School), from 2004. He was appointed headmaster of the school at the recommendation of the Seventh Day Adventist Church (responsible authority). On the 16th May 2018, the responsible authority withdrew its recommendation and requested 1st respondent to leave the school. He challenged this decision of the responsible authority and litigation ensued between the parties. He subsequently filed an application before this court in case number HC 1471/18, and on the 7th May 2019, his application was dismissed for want of prosecution.

On the 1st June 2020, 3rd respondent transferred 1st respondent to Cowdray Park High School, Bulawayo. He was directed to handover the school to the District Schools Inspector on or before 29 June 2020. The handover was not carried out and on the 27 July 2020, applicant wrote a letter to the Provincial Education Director, Bulawayo enquiring about the handover of the school and the vacant possession of the house. The handover was commenced on the 7 September and concluded on the 10 September 2020. On the 20 September 2020, applicant provided transport to carry 1st respondents property from the house. 1st respondent did not vacate the house.

Applicant then launched this application, which seeks the eviction of the 1st respondent from the house. It is argued in the founding affidavit that applicant owns the land upon which the school, the houses and other buildings are build. It is contended that applicant has no obligation to provide accommodation to the 1st respondent. It is said 1st respondent does not have applicant's consent to remain in occupation of the house. It is argued that he was long requested to vacate the house. It is contended that schools are opening on the 28th September 2020, and the house which illegally occupied by the 1st respondent has to be renovated, and given to the new headmaster of the school, and all this cannot happen when 1st respondent is still in occupation of the house. It is said there is no other remedy by which the applicant can procure vacant possession of the house other than approaching the court for a final interdict on an urgent basis.

Postponement

This application was placed before me and I directed that it be set-down for the 25th September 2020, for hearing. On the set-down date, Mr *Dube* applied for a postponement. He contended that 1st respondent was not ready for hearing, because his counsel of choice, a Mr *Ndlovu* was in Harare. Again, it was contended that the application was served on that day, i.e. 25 September 2020, therefore 1st respondent needed time to consult and get legal advice from his legal practitioners. This application for a postponement was opposed by Mr *Ncube*, counsel for the applicant. It was argued in opposition that this was an urgent application, it needs to be adjudicated with speed. It was said a postponement will defeat the object of the application. It was further contended that the application for a postponement was anchored on a falsehood. It was said the application was served on the 1st respondent on the 24th September

2020. A certificate of service was produced which shows that the application was served on one Mr Zwelabo Nkomo, a son in law of the 1st respondent. Service was effected on the 24th September 2020, at 16:23 hours. Mr *Ncube* also contended that on the 25th September 2020, before the set-down time he had a telephone communication with Mr *Dube*, following such communication he e-mailed a copy of this application to Mr *Dube*.

After hearing argument from the parties, I postponed to the 28 September 2020, the hearing of the matter. I indicated at that stage that the reasons for the postponement will be contained in the main judgment. These are the reasons: In *Savious Nkala Versus Pt Madiba N.O and Fadzai Senga* HB 17/20 the court said the following principles that are relevant to an application for postponement:

1. The court should be slow to refuse a postponement where the true reason for a party's non - representation has been fully explained and is not a delaying tactic and where justice demands that the party should have further time for the purpose of preparing his or her case.
2. An application for a postponement must be made as soon as the circumstances justifying same became known to the applicant, then the court may in an appropriate case allow an application that has not been timeously made.
3. An application for postponement must always be *bona fide* and not merely a tactful manoeuvre for the purpose of obtaining an advantage to which applicant is not entitled.
4. Prejudice is the main consideration. Court must weigh the prejudice to the respondent if the applicant is granted the postponement against the prejudice to the applicant if a postponement is refused and must consider whether any prejudice to be caused to the respondent can partly be compensated by an appropriate order of costs or in some other way.
5. Where an application for a postponement is not made timeously or the applicant is otherwise to blame but a postponement is nevertheless justified in the circumstances of the case, the court may in its discretion allow a postponement but direct that applicant pays the wasted costs on higher scale." See also *National Coalition For Gay & Lesbian Equality and Others v Minister Of Home Affairs & Others* 1999 (3) SA 173.

Again, a postponement is not just for the asking. The court must be satisfied that it is in the interests of justice that such postponement be granted. In *casu*, I took into account that everything has been happening very fast. The application was served on the 24th September 2020, at 16:24. It was served on a third party. The matter was set-down for the 25 September 2020. The application was e-mailed to Mr *Dube* on the very set-down date. I accept that in an urgent application the respondent must endeavour to act according to the speed the matter is moving. However, in such circumstances, when the respondent asks for a postponement to gather his thoughts, consult counsel and prepare for hearing, the court must in appropriate circumstances be amenable to such requests. The court should be slow to penalise a respondent who intends to prepare for a hearing, even if that party has failed to comply with the special time periods that have been fixed by the court. Again, I did not see any prejudice that would be caused to the applicant by postponing the matter. It is for these reasons that I acceded to the application for a postponement of the matter.

Concession made by the 1st respondent

On the morning of the 28th September 2020, Messrs Mabundu & Ndlovu addressed a letter to applicant's legal practitioners, i.e. Ncube and Partners. I reproduce the letter in *extensio*:

MESSRS NCUBE & PARTNERS
Legal Practitioners
Bulawayo

Dear Sirs

**RE: SEVENTH ADVENTIST ASSOCIATION OF SOUTHERN AFRICA-VS-PHANSON
TSHUMA & OTHERS: HC. 1631/20**

We refer to the above matter and confirm that we still act for the 1st Respondent Mr. Phanson Tshuma

Kindly note that after going through the Application and considering it, we advised our client not to oppose it. It is our view that the client had not considered the issues in question properly. Following our advice the client has since moved out of the premises and the keys have been handed over to the caretaker. It follows that the Application therefore becomes mute as it had been overtaken by events.

On this note, we kindly request that the Application be withdrawn with each party bearing its costs. We sincerely apologise for and on behalf of our client for any inconvenience caused. We copy this letter to the Registrar of High for the attention of the Honourable Justice Dube Banda

We are indebted in advance for your usual cooperation.

Yours faithfully

MABUNDU & NDLOVU LAW CHAMBERS

Applicant's legal practitioners quickly addressed a reply to 1st respondent's legal practitioners, I reproduce the reply hereunder:

Messrs Mabundu and Ndlovu Law Chambers
Legal Practitioners
Bulawayo

Dear Sirs

**RE:SEVENTH DAY ADVENTIST ASSOCIATION OF SOUTHERN AFRICA v
PHANSON TSHUMA AND ORS HC1631/20**

We refer to the above matter and your letter of the 28th instant marked extremely urgent received in even date.

Our clients confirm that they now have possession of the property. We thank you for advising yours accordingly.

However, our clients are of the firm view that yours should pay the costs on an attorney and client scale as this suit could have been avoided. They do not wish to be put out of pocket.

Yours faithfully

Ncube and Partners

In his opening submissions Mr *Ncube* said "I am at pains that we are here. The only issue outstanding between the parties is that of costs. I have instructions to insist on costs on an attorney and client scale." I pointed out to Mr *Ncube*, that for this court to determine whether 1st respondent should be ordered to pay the costs of suit, he (Mr *Ncube*) has to argue both the issue of urgency and the merits of the matter. How else would the court decide whether 1st respondent had to be ordered to pay the costs, and worse still on an attorney and

client scale without first deciding whether the application was meritorious in the first instance.

Mr *Ncube* expressed surprise why he was being asked to argue his case. He actually said it loud that he was “confused.” His confusion emanated from the fact that in his view, 1st respondent by letter quoted above had made a concession. He read a whole *paragraph* from the letter, to buttress his point that a concession has been made by the 1st respondent. In fact, it appears that on the date of hearing, 1st respondent had actually moved out of the applicant’s house. I reminded Mr *Ncube*, that a concession by the respondent is one of those factors that the court takes into account in deciding the matter before it, but it is not decisive. The jurisprudence in this jurisdiction shows that a court is not bound by the concession made by a litigant. The court does not merely-rubber stamp the position of a litigant. The grant of an order is a judicial function. The court must be satisfied that the concession put forward by a litigant has been properly taken. Representations made by a litigant, important as they might be, form part of the mosaic that the court has to consider in the determination of the matter. Such a concession cannot be “the be all and end all.” It is the court that grants an order, not a litigant. Once granted it becomes a court order, not a litigant’s order. A court cannot accede to an incompetent or unmeritorious order merely because the opposing litigant is consenting to it. Therefore, applicant could only justify its claim for costs by showing that this application is, first urgent, and if found to have been urgent, whether it was meritorious. To the extent that the applicant insisted on costs, it meant the dispute was not moot. In any event mootness is not an absolute bar to deciding an issue.¹

In this case I adopted a holistic approach. What this approach entails is that for the sake of making savings on the time of the court by avoiding piece-meal treatment of the matter, the issue of urgency had to be argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on urgency despite that it was argued together with the merits. But if the court considers the matter was indeed urgent, it then proceeds to deal with the merits. Perhaps at the risk of being repetitious the main consideration here is to make savings on the court’s most precious resource - time - by avoiding unnecessary proliferation when the matter should have been argued all at once.

¹*Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para [29]

Urgency

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.

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.

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, this Court has in the past considered various factors, including, among others: being whether the urgency was self-created; the consequence of the relief not being granted and whether the relief would become irrelevant if it is not immediately granted. 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 & Orsv Zimbank* 1998 (2) ZLR 301. To pass the test, good cause must be shown for the applicant to dislodge other litigants who are in the queue.

It is common cause that the 1st respondent had been in occupation of the premises known as Number 1, Solusi Adventist High School since 2004. He was requested to leave the school in 2018. He challenged the decision to leave the school, and his application was dismissed on the 7 May 2019. On the 1st June 2020, he was transferred to Cowdray Park High School. The process of handing over the school was completed on the 10 September 2020.

The fact that applicant has real rights of ownership of the property which rights are enforceable against the whole world, and that the real rights of ownership establish a clear right from a substantive area of law, cannot be a justification for urgency. Again, the fact that 1st respondent remains in occupation of the applicant's house without applicant's consent and that this is causing applicant unnecessary prejudice, cannot be a cause of urgency. That all the plans for the re-opening of the schools are hamstrung as there is an accommodation crisis created by the refusal of the 1st respondent to vacate the applicant's house, again cannot be a justification for urgency. That schools are opening on the 28th September 2020 leaving the applicant with less than seven (7) days (at the time of filing this application) to carry out all intended works, cannot be a justification for urgency. A matter does not assume urgency because a litigant has plans, the fulfilment of which require an immediate solution. A litigant must vindicate its rights timeously, not to wait for the proverbial eleventh hour to act, then come to court running with an urgent application. The existence of circumstances which may in their very nature be prejudicial to the applicant is not the only factor that a court has to take into account. To say applicant, apart from self-help, has no other efficacious remedy to protect its rights is not correct. It can issue a summons, court application, or whatever process, but not an urgent application in such a case.

Applicant talks of a final interdict. I do not know where all this comes from. Cut to the bone, applicant seeks the eviction of the first respondent from premises known as Number 1, Solusi Adventist High School. There possible could well be circumstances that could warrant eviction proceedings to be commenced by way of an urgent application, whatever, the case, this is not one of them. Applicant must have known by 2018 that 1st respondent was refusing to vacate the school house. It must have known that a new headmaster would be found and he will require accommodation. It must have known that the only accommodation for the headmaster was the one occupied by the 1st respondent. It must have known that the house would require renovations before occupation by the headmaster. It should have acted

there and then. Not to come to court approximately two years later and allege urgency. It waited and did not proceed to take lawful steps to take possession of the house and protect its right to the house and decided to come to court to launch an urgent application for eviction. Again, 1st respondent was on the 1st June 2020, transferred to Cowdry Park High School, but he still remained in occupation of the school house. It should have been very clear to applicant that 1st respondent was only going to vacate that house after a fight. Then to wait until the 23rd September 2020, to file an urgent application, seeking relief that should have been sought two years ago, or on the 1st June 2020, cannot be the kind of urgency anticipated by the rules of court. In my view, the applicant has failed to motivate a case for urgency. This is a text-book case of self-created urgency. This is not the kind of urgency anticipated by the rules of court.

When an applicant files an urgent application, the rules require, where such an applicant is legally represented, that a certificate of urgency be filed setting out why, in the opinion of the legal practitioner, the matter should be treated as urgent and not await set down in normal course. The certificate of urgency filed on behalf of the applicant does not show that the author applied his mind to the facts of this case. I wish to associate myself with the comments² made in the case of *General Transport & Engineering P/L v Zimbank Corp P/L* 1998 (2) ZLR 301 at 303A-B wherein the learned judge stated:

It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, the good faith can be tested by the reasonableness or otherwise of the purported view. Thus, where a lawyer could not reasonably entertain the belief that he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency.

There is a duty incumbent upon a legal practitioner before he files a certificate that a matter is urgent to carefully examine the case that is put to him and to satisfy himself that indeed the matter is urgent. As was stated in *Dodhill P/L and Anor v Minister of Lands and Anor* HH-40-2009 there is no formula which determines what constitutes urgency, nevertheless a legal practitioner should be diligent in certifying the urgency of a matter. Sufficient thought ought to be given to the issue of urgency. An applicant who has his matter dealt with on an urgent basis steals a march on other litigants and it is a facility which should

²Sanangurai Gwarada versus Kevin Johnson and Mr Williamson and Bernard Choto HH 91-09.

be accorded only to a few deserving cases. On the facts presented, this case did not merit such an accommodation.

This application does not meet the requirements of urgency. It should not have been filed as an urgent application. Therefore, applicant is not entitled to an order of costs.

Disposition

I find that this application is not urgent. In the result, applicant's prayer for costs is refused.

Ncube and Partners, applicants' legal practitioners

Mabundu and Ndlovu Law Chambers, 1st respondent's legal practitioners

Civil Division of the Attorney-General's Office, 2nd and 3rd respondent's legal practitioners