ANDREW JOHN PASCOE
versus
MINISTRY OF LANDS AND RURAL RESETTLMENT
and
W BUNGU
and
THE ATTORNEY GENERAL N.O.

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 & 19 December 2016, 11 January 2017

**Urgent chamber application**

*F Mahere*, for the respondent
*J Samkange*, for respondent

CHITAPI J: In this application, the applicant seeks the following relief as set out in the provisional order:

"TERMS OF FINAL ORDER SOUGHT

1. That it be and is hereby declared that second respondent's dispossession of certain land and buildings in respect of applicant's offer letter for a certain piece of land described as Subdivision 2 of Ivordale in the Goromonzi district of Mashonaland East Province measuring approximately 449.792 ha in extent dated 16 July, 2014 (hereinafter called "the property") which physical dispossession took place on or about the 5th December, 2016 and on subsequent days thereafter is and was unlawful on account that this was done without the consent of the applicant and without following due process and therefore in circumstances amounting to spoliation.

2. That it be and is hereby declared that the applicant, his agents, representatives, employees and invitees are entitled to peaceful and undisturbed possession of the property until such time as the respondents' or one or other of them applies for and obtains an order of ejectment against applicant having final effect from a competent court.

3. That Respondents' jointly and severally pay the costs of this application.

   INTERIM RELIEF

   Pending the determination of this matter applicant is granted the following relief:

   (a) That applicant's possession of the property referred to in his offer letter dated 16 July 2014 called Subdivision 2 of Ivordale in the Goromonzi District of Mashonaland East Province measuring approximately 449.792 ha in extent ("the property") be and is hereby restored in its entirety; and

(b) That second respondent and all other persons acting through or in common purpose with him remove all and any impediments on the property so as to permit free and unimpeded access by the applicant, his agents, employees and invitees in and to the property and of all improvements on it; and

(c) That the second respondent and all persons acting through or in common purpose with him shall forthwith upon the grant of this order vacate the property, including any buildings and that all movable assets and property including livestock that may have been introduced by them onto the property also be removed. Failing vacation and removal, that the Sheriff or his Deputy be and is hereby authorised and empowered to attend to the ejectment of the second respondent and of all other persons claiming occupation and use of the property through him.

SERVICE OF THE PROVINCIAL ORDER

That leave be and is hereby granted to applicant's legal practitioners or the Sheriff or his Deputy to attend to the service of this order forthwith upon the Respondents in accordance with Rules of the High Court."

On 16 December, 2016 which was the set down date, the respondents sought a postponement of the hearing. The respondents had not had enough opportunity to peruse the application and to prepare and file their responses. I postponed the hearing and following submissions by the applicant who was concerned that he could not access his planted crop. I asked the second respondent whether he had any problems with allowing the applicant to attend on his planted crop. The second respondent did not have a problem with this. I then granted an interim order pending the final disposal of the matter by myself. I consequently granted an interim order in the following terms

"IT IS ORDERED THAT:

1. The hearing of the application be postponed to 19 December 2016 at 2:30pm and ruling on wasted costs is reserved.

2. In the intervening period the 2nd respondent, his agents or any other person so inclined is hereby ordered not to interfere with or impede in any manner the applicant or his workers' access to and tending his crop of maize, groundnuts and soya beans and already planned on the disputed land subdivision 2 of Ivordale in Goromonzi as described in the applicant's founding affidavit.

3. The applicant shall not plant any new crops and the 2nd respondent shall not do or suffer to be done anything either by himself of through his agents on the disputed land as may affect the status quo which should remain so until the application is determined.

4. The respondents to file any opposing papers if they oppose the relief sought by no later than 12noon on 19 December 2016 and to serve the applicant's legal practitioner by no later than 1:00pm on the same date."

The first and second respondents filed their responses. The first respondent responded on the merits through an affidavit deposed to by the Permanent Secretary of the relevant Ministry. The first respondent's position was set out in the relevant paragraphs of her affidavit as follows:

> "3. I have read the applicant's founding affidavit and wish to respond as follows;
>
> 4. All due processes leading to the downsize of the applicant's farm size were observed and adhered to and the applicant was left with enough land to conduct his dairy farming activities and other operations.
>
> 5. The Ministry policy permits the applicant to wind up any operations and harvest any crops that he might have planted without any interference from the incoming beneficiary.
>
> 6. In essence, the 2nd respondent is to allow the applicant to wind up operations with no interference from himself and or any others that claim occupation through him.
>
> 7. In the premise, we abide with the court's ruling."

The first respondent's position was therefore that the Minister did not oppose the interim relief sought. This much appears clearly from an analysis of paragraphs 5 and 6 of the first respondent's affidavit. The Ministry does not allow an incoming beneficiary to interfere with operations of the incumbent operative who is given an opportunity to wind up his or her operations without interference.

The second respondent on the other hand was opposed to the application on 3 grounds, firstly that the application was defective and therefore a nullity, secondly that the matter was not urgent and thirdly on the merits. I deal with the issues raised in turn.

Defective application:

Mr *Samkange* submitted that there was no proper application before me because the applicant's legal practitioner is the one who prepared the application and proceeded to certify it as urgent by preparing and signing the certificate of urgency. He submitted that it was improper for the applicant's legal practitioner to prepare and sign the certificate of urgency. Mr *Samkange* acknowledged that there were two views expressed by this court through the judgments of CHEDA J and BERE J respectively in *Chifanza* v *Edgars Stores & Anor* HB 27/05 and *Dodhill (Pvt) Ltd* v *Minister of Lands & Rural Resettlement & Anor* 2009 (1) ZLR 182. The approaches are well known in this jurisdiction. CHEDA J reasoned that it was improper for the same legal practitioner who has prepared an application for a litigant to

certify the same as urgent. In the learned judge's view, another legal practitioner different from the applicant's legal practitioners should certify the matter urgent. Such different legal practitioner would exercise more objectivity as he or she had no interest in the case. BERE J's reasoning was that upon a consideration of the rules on the certification of an application as urgent, there was no requirement that a different legal practitioner should prepare the certificate.

Mr *Samkange* submitted that CHEDA J's approach made better reading. He sought to persuade me to therefore adopt the said approach and dismiss the application on this technicality. I asked Mr *Samkange* whether by not pronouncing a definitive position on the issue, the problem as to which approach to adopt did not lie with the courts as opposed to the litigants. Mr *Samkange* could not advance his objection further and quite understandably so because the field was open as to which of the two approaches to follow. The decision of CHEDA J had the concurrence of another judge, NDOU J. I will not deal with the issue of whether to the extent that another judge concurred with CHEDA J, the judgment should bind other judges. My own view is that one must find the answer in the relevant rules being rr 242 (2) and 244. There is no reference in those rules to a different legal practitioner having to certify an application as urgent. It does not appear to me that the applicant's legal practitioner is disqualified from certifying as urgent an application which he or she has prepared. I will venture to hold that it makes eminent sense and logic for the legal practitioner who has prepared an application to certify it and for reasons he gives as being urgent. I am not persuaded that the rationale of the rules on the making of a certificate of urgency was to require an applicant to remove his or her brief or instructions for scrutiny by another legal practitioner other than his chosen one. There is just no logical reason to require that an application prepared by one legal practitioner is scrutinized by another legal practitioner or for such other legal practitioner let alone from a different firm to also formulate his or her views on whether the matter is urgent. What if a legal practitioner who is approached deems the application not urgent and another one is approached and agrees that it is urgent. This leaves the applicant's legal practitioner still unsure as to which one of his colleagues is correct. Will the applicant's legal practitioner seek a third opinion? If so, then what?

It appears to me that what is important about a certificate of urgency lies more in case management than in the merits of the urgency of the matter. In terms of r 244, the presence of a certificate of urgency as part of a chamber application determines how the registrar of this court will deal with the matter. If a certificate of urgency forms part of the papers, the

registrar "…shall immediately submit it (the application) to a judge, who shall consider the papers forthwith…". If the certificate of urgency is there to aid with case management then surely there would be no reason or rationale to require that an applicant should engage two different legal practitioners, the first one to prepare the application and the second one to peruse the application and certify it as urgent. A legal practitioner who is seized with urgent instructions and decides to petition the court for urgent relief should surely be able to assess the urgency of a particular matter. Such legal practitioner qualifies as "**a legal practitioner**" (see rule 244) for purposes of certifying the application as urgent thereby aiding the registrar in determining on which roll of cases the applicant's case will be managed. As already observed the Registrar will refer the matter to urgent applications roll.

A judge before whom an urgent application is placed is not bound by the certificate of urgency. The urgency of the matter must be demonstrated by the applicant not in the certificate of urgency prepared by a legal practitioner but in the founding papers. A judge will consider whether the matter is urgent by reference to the applicant's complaint and the relief sought. A certificate of urgency performs the role of directing the registrar to place the application before a judge for consideration upon its filing. The fact that the certificate of urgency is relevant to case management is borne by the fact that a non-represented or self-acting litigant is not required to file one. The certificate of urgency is therefore in my view a tool for case management and a court's or judge's judgment should not be based on such certificate but on the founding affidavit and supporting documents if any.

In *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbank Corporation (Pvt) Ltd* 1998 (1) ZLR 301 and *Tripple C Pigs & Anor* v *Commissioner General Zimbabwe Revenue Authority* 2007 (1) ZLR 27, the point is made that a legal practitioner who prepares and signs a certificate of urgency must set out reasons which will have led to his belief that the application is urgent. In *the General Transport & Engineering (Pvt) Ltd* v *Zimbank Corporation (Pvt) Ltd* case (*supra),* GILLESPIE J made the remark at p 303 that,

> "… where a legal practitioner could not reasonably entertain the belief that he professes (i.e that the matter is urgent) he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly, in giving his certificate of urgency".

I am inclined to believe that these remarks could only properly apply to applicant's legal practitioner. If this were not so, it would mean that another legal practitioner who has simply been given an application prepared by another to read and formulate an opinion as to urgency would run the risk of being charged for unprofessional conduct by granting his or her

certificate where the court considers that such certifying legal practitioner could not have reasonably believed on the facts of a matter that it was urgent.

There is also another aspect which was not considered by CHEDA J when he held that it was improper for the applicant's legal practitioner or a legal practitioner in the same firm to attest to a certificate of urgency. The learned judge was of the view that the objectivity of the applicant's legal practitioner and members of his firm would likely be compromised by the pecuniary interest which the firm would have in wanting to earn fees. Further the learned judge reasoned that the same firm would seek to advance its goodwill by seeking to bring a clients matter to a successful (1 would say speedy) conclusion. The aspect which rings in my mind is one of privilege between a legal practitioner and his client. In short, communications and files of one legal firm should not be for the consumption of another firm or its legal practitioners to express an opinion on save where such privilege is waived expressly by a client or because a matter has been filed at court and a record which becomes a public record has been opened. I am not prepared to accept that the intention of the rules on urgency were intended that where an applicant files an urgent application, at least two firms or two legal practitioners not from the same firm should become involved in the matter. Suppose an urgent matter arises and a legal practitioner is instructed to petition the judge and it is late at night, can it be seriously argued that the rules would require that the applicant's legal practitioner engages in a manhunt for another legal practitioner in the wee hours of the night so that such other legal practitioner reads through the application and prepares and signs a certificate of urgency. A situation can also arise where an urgent application has taken a whole day to prepare and is voluminous, requiring several hours on the part of another legal practitioner to go through the application. It would be absurd to require the certifying legal practitioner to leave his own work and to devote hours to reading through an application simply for purposes of preparing a certificate of urgency. Would such legal practitioner charge for such work and using what rate? I am not leastwise persuaded that the purport of the rule on preparing a certificate of urgency was intended that another legal practitioner, equally qualified and trained should submit a prepared application to another qualified legal practitioner in a different law firm to scrutinize his application and express an opinion as to the urgency of the matter. The rule must be read as directed at the applicant who is represented to have his or her legal representative certify an application as being urgent the rationale of process of preparing and filing such certificate, being to request the registrar to place such application forthwith before a judge for consideration.

In so far as I am aware the practice in other jurisdictions likes South Africa with respect to urgent applications is to require that it is the applicant who must explicitly set out in his or her affidavit or petition, the circumstances which he avers render the matter urgent. In addition such applicant is required to set forth reasons to show that he or she cannot get adequate redress if the matter is heard following the queue. See r 6 (12) of the South African Uniforms Rules of Court. The practice in Botswana is the same as in South Africa in that there is no requirement for a certificate of urgency to be filed with an urgent application. See Order 12 r 13 (1) and (2) of the Rules of the High Court of Botswana. In Botswana the applicant as in South Africa is required to justify urgency and why he or she believes that it will not be possible to get redress in the normal course. It does not however appear to me that the requirement for a certificate of urgency to accompany an urgent application is without reasonable justification. In my reading of the rules, the certificate as I have indicated, acts as a request to the registrar that the application be case managed as an urgent application. The debate as to whether or not a different legal practitioner or the applicant's legal practitioner should do the certification appears to me to be a matter of the interpretation to be placed on the relevant rule and as such a matter of detail because whichever approach is adopted, it is the judge to whom the application is referred who determines whether or not to enrol the matter and hear it as an urgent one. It is also the applicant who must show on his or her papers that the matter is urgent. The urgency is demonstrated or justified in the founding affidavit.

Following on my interrogation of Mr *Samkange's* first point *in limine* as set out above I must rule that the same must fail. Litigants must not after all be prejudiced by conflicting approaches by a court or judges. Mr *Dury* on the authority of pronouncements of this court on who may prepare a certificate of urgency and sign it was justified to prepare and sign it as the applicants' legal practitioner and I daresay, that in my view, the applicants' legal practitioner who has full knowledge of the case following instructions given to him would be best positioned to express an informed opinion on urgency of the matter and should therefore prepare the certificate. Where a judge queries the urgency of a matter which has been certified by the applicant's legal practitioner as urgent, such practitioner can then justify his opinion. Any other approach would mean that the applicant would have to argue in justification of why the other legal practitioner certified the matter as urgent. The other certifying legal practitioner may end being called to justify his issuance of the certificate to avoid an adverse order being made against him or her if the remarks of GILLESPIE J were to

be considered that it constitutes an act of dishonesty for a legal practitioner to certify a matter as urgent when it is not in such practitioner's belief urgent.

Mr *Samkanges's* next point *in limine* as I have indicated was that the application was not urgent. The second respondent contended in para 10.1 to 10.3 of his opposing affidavit the applicant had created the urgent situation by ploughing on the second respondents' farm without the second respondents consent. The second respondent averred that he accepted an offer letter for the disputed piece of land and took possession of the piece of land on 16 November, 2016. He argued that it was the applicant who had now invaded his piece of land by ploughing on it. I noted however that the second respondent did not file a counter application to assert his rights. The first respondent in his affidavit appeared to support the applicants' right to wrap up his operations without hindrance from the second respondent or the new beneficiary. Mr *Mutomba* for the first respondent indicated that he had no submissions to make on the issue. I took it that he was relying on the point *in limine.* I should in passing indicate that it does not really assist a court or a judge for a legal practitioner to stand up and say he or she has no submissions. It assists the court if a legal practitioner takes a position because the party whom such legal practitioner represents cannot be said or held not to have a position on a point which arises in a matter in which such party has an interest. By not taking up the issue of urgency, it can only mean that the first respondent accepted that the application was urgent. Had he been disposed otherwise, he would have argued the point.

Miss *Mahere* for the applicant submitted that there was no self-created urgency. She argued that the applicant's case was not based on when the applicant purported to have taken possession of the piece of land allocated to him. She submitted that the application was for a spoliation order arising from acts of spoliation as detailed in para(s) 17 and 18 of the founding affidavit. The allegations made by the applicant in these paragraphs were that the second respondent and some youths had on 8 December 2016 come in a combi vehicle around 9:20am to the applicants' field area where a tractor was spraying chemicals on a soya land. The first respondent is said to have ordered that all activities being carried out by the applicant or on his behalf be stopped. The respondent proceeded to the applicants' occupied homestead and offloaded his belongings which included a bed, mattress, 5 chairs and other household effects. The goods were then put in the applicants' security managers' occupied house. The security manager was ordered to vacate the house, remove his belongings and the respondent fitted his own padlock to the main entrance. On 9 December, 2016, the first respondent reportedly threatened to bring five herd of cattle, some goats as well as 8 of his 19

dogs to a cattle kraal within the applicants' occupied piece of land. He also reportedly threatened to bring some of his farm workers to take up residence near the cattle kraal. The first respondent reportedly ordered that the applicants' mother should vacate her occupied residence within the disputed piece of land so that the first respondent takes over possession and occupation of the same.

The applicant filed the spoliation application before me on 9 December, 2016. It is clear therefore that the applicant did not wait a day longer after the acts complained of had taken place to petition the court for appropriate relief. Whether or not a matter is urgent is a value judgment which a judge reaches upon a consideration of all the objective facts and circumstances surrounding the matter to be determined. The celebrated judgment of CHATIKOBO J of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 189, has become the bible or leading case followed in this jurisdiction in so far as it sets out the factors which determine whether or not a matter qualifies for urgent hearing. The learned judge stated as follows on p 193 of his judgment:

> "What constitutes urgency is not only the imminent 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 acting until the deadline draws near is not the type of urgency contemplated by the rules".

The upshot of the remarks of CHATIKOBO J as above quoted boil down to the need for an applicant whose rights have been infringed or are about to be infringed to assert such rights immediately and not wait for harm to draw near or eventuate before acting.

The remarks of GOWORA J (as she then was) in *Triple C – Pigs & Anor* v *Commissioner General, ZRA* (*supra*) at p 30 G – 31 D put the icing on the cake by further ventilating CHATIKOBO J's remarks in *Kuvarega's* case. The learned judge stated:

> "Naturally every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally the courts in order to ensure delivery of justice, would endeavour to hear a matter as soon as is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would render *brutum fulmen*."

The remarks of GOWORA J sums up the second consideration in determining urgency. A party should act immediately when the need to act arises and in addition must demonstrate

irreparable harm actual or potential arising from the infringement of the party's legitimate rights or interests. The infringement must be such that failing immediate redress, there would be nothing left to redress and/or any other future redress would not provide adequate remedy to correct the wrong.

*In casu,* the applicant acted immediately upon the wrong as perceived by him having been committed. He alleged acts of spoliation. A spoliation is an act that the court will not countenance. It smacks of anarchy whereby persons take the law into their hands. To allow spoliation a place in society or condone it will lead society back to pre-civilization days where the maxim each man for himself and an eye for an eye were the order of the day. A court will therefore as a matter of practice and routine treat spoliation application to be dealt with as urgent matters provided of course that the other procedural requirements have been met.

On the merits, the applicant simply has to establish a *prima facie* case to obtain a provisional order. A consideration of the papers filed in this matter and the parties submissions have left me satisfied that the applicant managed to establish a *prima facie* case. The second respondent did not really deny the acts of spoliation complained of by the applicant. His attitude appeared to me to be that of one claiming a right to the disputed piece of land and hence by such right, an entitlement to act in whatever manner he chooses. For example in para 26 of his opposing affidavit, he admitted that he brought his property onto his allocated farm and did not need anyone's authority or permission to do so. He misses the point. The claim of right defence does not apply to spoliation proceedings. In para 27 of the same opposing affidavit, the second respondent averred that he "politely" asked the applicant to vacate the property. He does not however allege that the applicant when politely asked to vacate as averred agreed to do so. The applicant without doubt did not agree to vacate the farm nor cease his did he allow the second respondent to chuck him out of the farm or disturb the applicant's farming activities. The applicant petitioned the court for protection because he did not consent to the second respondent's acts of spoliation or takeover. The second respondent should look to the law to enforce his rights and the more so taking into account that as a Chief he must lead by example and obey and uphold the country's laws.

A close reading of the second respondent's affidavit shows that he has no defence to the allegations of spoliation. He describes the applicant as being defiant of his authority as Chief and being disrespectful. The second respondent averred in para 31 of his opposing affidavit as follows:

> "… It is clear that what the applicant is trying to do is to prevent me from enjoying peaceful possession of my farm which was allocated to me by the first respondent."

The second respondent averred in his opposing affidavit that he cannot live with the applicant whom he referred to as his 'subject' in his area where such subject is hostile to him. He avers that the applicant must leave the area. After hearing submissions from Mr *Samkange* I formed the view that the second respondent felt challenged in his authority as Chief of the area by the applicant who challenged his takeover of the farm after allocation by the first respondent. The law is blind. Every person is equal before it. It would be a sad day for the gains which civilization and democracy have made if people in authority were to consider themselves as being a law into themselves.

The facts of this matter are straightforward. The first respondent has downsized the applicant's farm. A portion thereof has been allocated to the second respondent. The applicant has property and a crop on the farm. Until such time that the applicant vacates the portion allocated to the second respondent either on his own violation or by eviction sanctioned by law, no one including the second respondent is allowed to forcibly occupy the farm including the portion allocated to the second respondent. Even the allocating authority being the first respondent has deposed to the fact that it does not support a policy of hostile takeover.

I therefore rule that the applicant has on a balance of probabilities made out a case for spoliation and is entitled to the relief which he seeks.

When I initially postponed this application on 16 December, 2016 at the instance of the respondents, I reserved my ruling on wasted costs. I have considered the parties' submissions in regard thereto. The respondents had *bona fide* reasons for not filing opposing papers timeously. The first and second respondents were said to have been already at or enroute to their political party's annual convention in Masvingo. The applicant was also not prejudiced by the postponement because I granted an interim order in his favour as already adverted to. I therefore order that there be no order of wasted costs of the postponement of 16 December, 2016.

For the avoidance of doubt, I accordingly determine the application as follows:

1. The application succeeds and the interim relief as set out in the provisional order is hereby granted.

2. The interim order issued on 16 December, 2016 is discharged and the interim relief as aforesaid shall substitute it.

*Honey & Blackenberg*, applicant's legal practitioners
*Venturas & Samkange*, respondents' legal practitioners