IVY RUPANDE
versus
MARTIN C. GROBLER
and
PROTEA VALLEY (PRIVATE) LIMITED
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 17 December 2018 & 20 December 2018

**Urgent Chamber Application**

Applicant in person
*W. P Mandinde,* for the 1st and 2nd respondents
*E Mukucha,* for the 3rd respondent

CHITAKUNYE J. The applicant approached this court with an urgent chamber application seeking leave to execute an order of this court pending appeal. The basic facts are that on 14 November 2017, the applicant issued summons for the eviction of the first and second respondents from a certain piece of land described as Subdivision 4 of Lot 1 of Buena Vista in the district of Goromonzi.

The aforesaid respondents excepted and pleaded to the applicant's claim. Their exception was heard on the date of trial on 8 October 2018 as preliminary points after which judgement on the preliminary points was delivered on 17 October 2018 dismissing all the preliminary points.

The main matter was later set down for hearing on 8 November 2018. On that date respondent's legal practitioner attended court without his clients. His efforts at seeking a postponement of the matter were to no avail as the trial judge proceeded to grant a default judgment against both respondents.

Upon obtaining the default judgement applicant proceeded to obtain a writ of execution/ejectment. She thereafter instructed the sheriff to carry out the execution. In the meanwhile the first and second respondents had noted appeals to the Supreme Court against the two judgments that had gone against them. The 1st notice of appeal against the judgement

on the preliminary point was filed at the Supreme Court on 22 October 2018 under case number SC 787/18 and the second notice of appeal against the default judgement was filed on 20 November 2018 under case number SC 882/18.

The sheriff in response to applicant's instruction to execute advised applicant that respondent had appealed against the default judgement to the Supreme Court.

It is this development that spurred applicant to approach this court on an urgent basis seeking an order that:

1. Leave to execute the order of this court under case number HC 10633/17 be granted
2. This order shall remain operational and shall not be suspended by any appeal that may be lodged against it
3. The respondents shall bear the costs on the highest scale of legal practitioner and client possible in terms of the Law Society of Zimbabwe tariff.

In seeking the above order the applicant alleged that the appeals by the respondent were a nullity and were meant to frustrate her.

The applicant also alluded to the fact that besides filing the notice of appeal under SC 882/18, respondents had also filed an application for rescission of the default judgement granted on 8 November 2018.

The first and second respondents opposed the application whilst third respondent was in support of the application.

In their notice of opposition first and second respondents raised three *points in limine* to the effect that:

i) There was no proper application as applicant had used the wrong form for the application; that she had not used form 29B or 29;

ii). the relief sought is incompetent as applicant was seeking a final order with no interim relief;

iii). the application is not urgent at all as the dispute between the parties has been on-going for a long time.

Upon hearing arguments on the above I was of the view that as applicant was a self-actor who had substantially complied with the requirements in terms of form, this point was unsustainable. It is within this court's discretion not to be hamstrung by strict from requirement at the expense of substance. In that regard the form would not deter the hearing of the matter.

The issues of the relief sought and urgency were argued to some lengthy. In as far as applicant was seeking leave to execute pending appeal the issue that arose was what interim relief applicant could seek in light of the circumstances of this case. No ready answer was forthcoming in this regard. The applicant herself was at sea as regards that aspect.

I thus allowed argument on the other points as I was of the view that in as far as the final relief to be granted could be amended upon ventilation of the real issues between the parties and considering applicant was a self-actor who had tremendous difficulties in understanding the objection to the relief she was seeking. Justice dictated that she be heard and if she met other requirements the relief to be granted could be amended to suit her needs.

The issue of urgency was in my view party of the arguments that involved some aspects of the main application. It is trite that when a litigant approaches court on an urgent basis they are seeking to jump the queue of other matter. It is in appreciation of this that this court has set forth criteria that must be met for a case to be heard on urgent basis. For self-actors such criteria has not been easy to comprehend as more often than not any case that they bring is deemed urgent.

The question of what constitutes urgency has been debated in these courts for long and what emerges is that each case must be taken on its own circumstances. The broad circumstances were enunciated in such cases as the *Kuvarega* v *Registrar & Anor* 1998 (1) ZLR 188; *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002. In this latter case court alluded to the fact that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. This court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with that matter on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis."

See also *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In *Document support Centre (Pvt) Ltd* v *Mapuvire* 2006 (1) ZLR 240 (H) at 244C -D MAKARAU JP (as she then) was opined that:

> "In my view , urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

It is thus clear that what constitutes urgency is not only the arrival of the day of reckoning but also that when the need to act arises the matter cannot await or else applicant will suffer irreparable harm. It is not every harm or inconvenience that constitutes irreparable harm. It is thus upon applicant to satisfy court that he/she will suffer irreparable harm if the relief is not granted.

In *casu,* the judgement that applicant wishes to execute pending appeal was a default judgement granted on 8 November 2018. She then learnt that the judgement cannot be executed as respondents had noted an appeal and this was on 29 November 2018. It is that notification that spurred applicant to file this application on 12 December 2018.

It is my view that applicant did not sit on her laurels in seeking this court's intervention, she acted timeously given her circumstances.

Whilst accepting that applicant acted with a sense of urgency, the real problem pertains to the irreparable harm she alleges she will suffer if the application is not treated urgently.

In paras 8 and 9 of her founding affidavit she states the following:-

> "8. I will suffer irreparable harm if respondents are to continue to occupy my land illegally in that the farming season has already commenced and there is no way I can proceed to do my farming as long as they are still in occupation.
>
> 9. I had already purchased farming inputs that I intend to use at my farm on the strength of the order that granted me access to my land."

This basically captures the harm applicant says she will suffer. As is evident the harm is not particularised such that its magnitude would be appreciated. I am of the view that applicant ought to have shown that the harm was irreparable in the sense of its magnitude and that she will be unable to recover from such loss or harm. In her *viva voce* submissions, applicant could not say for instance what inputs she had acquired and the magnitude of the harm or loss to be suffered if she did not get the relief sought. It is my view that the above paragraphs 8 and 9 are mere bald assertions that needed to be substantiated. The impression one gets is that applicant is desirous of taking occupation of her land for agricultural purposes and failure to do so now will inconvenience her in her plans. It is however clear from the history of the dispute that she has suffered such inconvenience with no irreparable harm suffered. This aspect of the need to show irreparable harm to be suffered if leave is not granted is also relevant to an application for leave to execute in that court considers, *inter alia,*

'1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted and

2. The potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused.'

Having failed to overcome this hurdle at this juncture it is unlikely applicant will succeed even on the main application.

It is my view that in as far as the determination of a matter on an urgent basis has the inconvenience of not affording parties opportunity to ventilate their positons in full, the relief that applicant is seeking which is final in nature cannot be granted. The applicant would be required to prove a clear right if the order is to be granted.

In casu, the applicant could not establish a clear right in light of the respondents' competing claim over the same property. The applicant claims to have been granted an offer letter as a result of which she has not got a default judgement for the eviction of the respondents. The respondents, on the other hand, have been at the property in question and claim to have been offered that same piece of land as noted in annexure 3 to the opposing papers and that they are challenging the judgement for their eviction.in such circumstances justice requires that parties be given the opportunity to fully ventilate their respective positions before a final order is granted.

See *Paul Muwoni v Rodgers Brothers & Son (Pvt) and another* HB 227/18 wherein competing claims based on similar offers made before the promulgation of SI 53 of 2014 was alluded to.

Where a litigant approaches court on a certificate of urgent it is generally incompetent to seek a relief that is final in nature. In *Brian Andrew Cawood* v *Elasto Madzingira and another* HMA 12/17 at p 5 MAFUSIRE J aptly restated this point as follows:

"The first was that the relief sought was incompetent. It was effectively a final relief. You do not seek a final order through an urgent chamber application.

It has been stated time and again that the object of an urgent application is to obtain interim relief. Because of the urgency that may be manifest on the papers, the application is allowed to jump the queue of cases awaiting determination at the courts. But the issues are not interrogated to any great depth. As long as an applicant shows a prima facie right, even if this be open to some doubt; a well-grounded apprehension of an irreparable harm; that the balance of convenience favours the granting of an interim interdict; that there is no other satisfactory remedy; and there are reasonable

prospects of success in the merits of the main case, the applicant should be entitled to relief."

See also *Kuvarega* v *Registrar-General & Others (supra*) at 193A-B and *Women &* Law *in Southern Africa &Others* v *Mandaza & Others* 2003 (2) ZLR 452(H)

It was clear from applicant's own assertion that besides the appeals that may have their own challenges, the respondents have applied for the rescission of the default judgement.

As regards the applicant's assertion that respondents' appeals are doomed to fail, whilst there may be some merit in that, she also acknowledged that respondents have in fact also filed an application for rescission of the default judgement. I did not hear applicant to allege that that application is also doomed to fail. What this entails is that there may be a valid application for rescission whose determination may go either way. This again speaks to the need not to grant an order in the nature of a final order. The relief sought cannot be granted on the basis of urgency.

Accordingly the application be and is hereby struck off the roll of urgent matters with each party to bear their own costs.

*Mugiya and Macharaga*, 1st and 2nd respondents' legal practitioners
*Civil Division of the Attorney General's Office*, 3rd respondent's legal practitioners