

KUDZAI NDUKU
and
KEVIN GUZAH
versus
LUO TINGPEN
and
LI YIZE
and
GAMUCHIRAI NIGEL ZUZE
and
JINGLONG SECURITY SERVICES (PVT) LTD
and
MING CHANG SINO AFRICA (PVT) LTD

HIGH COURT OF ZIMBABWE
MABHIKWA J
HARARE, 17 April 2018 & 26 April 2018

Ruling

Mrs *Ruth Zimvumi*, for the 1st & 2nd applicants
Ms *D Sananga*, for the 1st, 2nd, 4th & 5th respondents
G Nyengedza, for the 3rd respondent

MABHIKWA J: The applicants brought this matter before this honourable court as an Urgent Chamber Application.

Brief Facts

Applicants filed an application termed,

“Urgent Chamber Application for an order compelling the respondents to contribute medical expenses pending determination of the damages claim under HC 2589/18.”
(emphasis is mine.)

The short history of the matter is that on or about 19 February 2018, the applicants were involved in a shooting incident. On 20 March 2018, they issued summons out of this Honourable

Court against the 5 respondents. They alleged in their declaration that first to third respondents, “mercilessly shot and assaulted them” on 19 February 2018 thereby causing them serious injuries. The fourth and fifth respondents were sued in their various positions as employers of the first, second and third respondents. That matter was filed under case No. HC 2589/18. It is currently at the pleadings stage.

On 11 April 2018, applicants then filed this application. As already stated, the wording of their application was ‘an urgent chamber application for an order compelling the respondents to contribute medical expenses pending the determination of the damages claim under HC 2589/18.’ It was also alleged in the application that applicants suffered serious injuries as well as untold physical and mental pain. It was further stated that they had run out of money to cater for the crucial medical expenses required for treatment and that they are therefore in need of financial assistance as the medical bills required a lot of money.

Applicants alleged that the respondents do not deny liability and that what needed to be argued was only the quantum of damages. They stated further that if not granted the relief sought, they ran the risk of permanent disability or even death.

Out of abundance of caution I decided to immediately set the matter down and directed the parties’ legal representatives to appear before me and make further submissions in terms of Order 32 r 244 of the High Court Rules.

I however dismissed the application and the following are my reasons.

The Law

It is trite law that there is no strict rule of law deciding whether a matter is urgent or not and that in practice, the court, as provided for in the High Court Rules, 1971 will afford relief to those litigants who seek such relief on an urgent basis. Whether to treat the matter as urgent and set it down for hearing or grant the application in chambers or not is a matter which is entirely within the judge’s discretion upon being satisfied on the papers. See GOWERA J (as she then was) in *Triple C Pigs and Anor vs Commissioner General*, ZLR, 2007 (1) ZLR 27 (H).

However, the judge must remain impartial in exercising his discretion.

In *Kuvarega v Registrar General & Anor*, 1998 (1) ZR 188 (H) at 193 F-G this court held that

“[...] 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 is not the type of urgency contemplated by the rules. [...]"

It was further stated in *Kuvarega* that the affidavit accompanying the application should state as a matter of fact and not opinion that the applicant will suffer some form of prejudice or irreparable harm if relief is not instantly afforded to him. However, the element of harm should not be confused with urgency.

In *Document Support Centre (Pvt) Ltd v Mupurore* 2006 (2) ZLR 240 (H) MAKARAU J (as she then was) endorsed CHATIKOBO J's sentiments from *Kuvarega*. She went on to state that

".... It appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications..... Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale of the court acting swiftly where such interests are concerned is in my view clear. Failure to act in these circumstances will result in the loss of life or the liberty of individuals or the infliction of irreversible physical or psychological harm on children." (emphasis is mine)

At the time the parties were called upon to appear in chambers, the respondents had not yet filed any opposing papers. Although with some misgivings, it was the allegation of the possibility of death and the need to protect life that the matter was set down, erring in my discretion on the side of caution. There was, however always the looming question as to why now, after initially filing a summons action after the shooting on 19 February 2018.

On the date when the matter had been set down for hearing, which was 17 April 2018 at 0930 hrs, the counsel for the applicant stated that her client, the first applicant, insisted on being present at the proceedings. Upon being informed that first applicant was incapacitated and being transported via stretcher and ambulance, the courts chambers had to be moved to an accessible court in close proximity to an entrance/exit and unencumbered by stairs. The second applicant was not in attendance and no explanation for his absence was given at the time. The respondents, were then represented and produced their opposing papers which they had filed that very same morning. They made further oral submissions. In short, the application was strongly opposed.

Respondents averred that the matter is not urgent and in fact raised points *in limine* notably the fact that the certificate of urgency was fatally defective. The legal practitioner who certified it as urgent stated that he had read and understood the "applicant's founding affidavit for an urgent chamber application and had applied his mind to both the facts and cause thereof." Ultimately, in

a ten-paged certificate the attorney stated that he was convinced that the matter was indeed urgent. However, it was argued by the respondent that the certificate itself was a deliberate misrepresentation to the court. The respondents argued that the certificate of urgency showed that it had been written and or signed on 10 April 2018 while the founding affidavit which the certificate itself relied upon, was only written and or signed on 11 April 2018. **How then could the certifying practitioner have laid eyes on and certified as urgent a document which was not yet in existence at the time?**

Another point *in limine* which was raised was that the applicants had deliberately concealed certain facts to the court with the intention to mislead it. For instance, while the applicants had stated in their papers that it was common cause that the applicants had indeed been shot by the respondents, this was deliberately false and or misleading on their part as they were aware that this fact was vigorously disputed both under the damages claim in HC 2589/18 and in the criminal proceedings at the Regional Magistrates Court.

The respondents argued that at the Regional Magistrate's Court, they had clearly denied shooting the applicants and that in fact the first respondent was nowhere near the scene of the crime. It was further argued that the regional court trial had actually commenced and the first applicant had testified before that court. In her testimony, she had told the Regional Court that her facial condition as shown in Annexure "A2" was not related in any way to the shooting but rather a condition she had been afflicted with since birth.

It was also argued that after first applicant's testimony, the criminal proceedings had to be postponed several times because of second applicant's unavailability as he was said to be in China where he is apparently a university student. The last such postponement was allegedly on 12 April 2018 wherein the matter was remanded until 25 April 2018 on account of the second applicant's unavailability. And yet despite his alleged unavailability the same second applicant was still able to depose to a supporting affidavit the day before (11 April 2018).

The applicant's legal counsel responded to these allegations as typographical errors and omissions and urged the court to disregard them in the interests of justice and in the exercise of its discretion.

Analysis

Nature of the Cause of Action and Relief Sought

A simple look at the application shows that what appears as the heading is not what is contained in the body of the same application. The actual relief sought in the draft order is also not in tandem with that suggested by the heading.

In the application, applicants reproduce the same claim which is under HC 2589/18, back it up by affidavits and then seek the same relief they sought in that HC 2589/18. **The effect of which is that although dubbed a ‘contribution’ in terms of the heading, or an Interim Order in terms of the draft,** the effect of the papers is that they seek a final order for essentially the same sum as that claimed in HC 2589/18.

In chambers, the court sought to remind the applicants as much as possible that the issue of liability first is crucial and that clearly before it is determined the relief they seek would be improper. In any case, damages of such a nature and in a contested matter cannot and should not be awarded in chambers without the leading of evidence in an open court. The court reminded the applicants further that clearly, the request shown by the application’s heading is a different one which they probably needed to stick to. The applicant’s legal practitioners stood firm that their instructions were to stand by the papers filed and similarly the relief sought in their draft. For the record, the ‘interim’ relief sought was damages to the tune of seven hundred and seventy-one thousand, eight hundred and ninety-five dollars (\$771 895.00).

Counsel for the applicants where asked whether or not this was asking the judge in chambers to effectively grant final relief, thus circumventing the entire court process set in motion by HC 2589/18. An improper course of action especially given the fact that the matter was hotly contested and the opportunity for the leading of evidence would not be accorded to the opposing party. They responded by then claiming that the figure of \$771 895.00 was a typographical error and implored the judge to consider the first applicant’s plight and exercise his discretion to grant relief. They stuck to the argument that in their opinion, the question of liability is not in issue, they even implored the judge to amend the draft order as he deemed fit and “in the exercise of his discretion” grant relief.

It should be noted that the relief sought was clearly not a competent one.

- a) The application for an order compelling the respondents to contribute towards medical expenses, which applicants abandoned anyway, was not supported by corresponding medical evidence, not the general delictual damages claimed in the main action.
- b) There was no proof of urgency of the alleged possible danger to life from a medical expert.
- c) There was no proof of unavoidable medical expenses necessary to avert the alleged danger to life if so shown.
- d) There was no evidence to show current urgent medical attention and the period it would take to avert the danger so alleged.
- e) There was no proof of the amount of physiotherapy fees, ambulance fees, wound dressing fees etc.

Ultimately

- 1) There was no urgency in reality save to say the applicants wanted the court to consider 1st applicants injuries, sympathise with her and find cause for urgency.
- 2) The certificate of urgency itself was indeed fatally defective.
- 3) Applicants' application continued to be no more than a plea to "jump the que" and determine the whole claim on an urgent basis through a chamber application, before the respondents' liability or otherwise was also determined in case number HC 2589/18
- 4) The relief sought was clearly final in nature.

Accordingly,

1. The matter is not urgent.
2. The matter is removed from the roll of urgent matters
3. Applicants be and are hereby ordered to pay costs of suit.

Ruth Zimvumi Legal Practice, applicant's legal practitioners
Messrs Hussein Ranchhod & Co, 1st, 2nd, 4th & 5th respondents' legal practitioners
Scanlen and Holderness, 3rd respondents' legal practitioners