KHUMBULANI FUNGAI CHIVANGA
versus
JEREMIAH MAHOSO

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE,10 October 2017, 13 November 2017 & 31 January 2018

Urgent chamber application

S.M. Hashiti, for the applicant
T Zhuwarara, for the respondent

NDEWERE J: On 2 October, 2017, the applicant filed what he called an "Urgent Chamber Application for Spoliation."

The certificate of urgency on p 3 was very economic with the specific facts leading to the conclusion by the legal practitioner that the matter was urgent. It did not tell us exactly what it is that was done by the respondent. It merely alleged "self-help and illicit" unlawful deprivation of the applicant of "her peaceful and undisturbed possession, occupation and control of his stand". It did not give the facts which constituted the self-help and illicit unlawful deprivation of the applicant. It went on to say the respondent's conduct was unlawful and constituted spoliation and called for a speedy remedy. Not even one date was provided throughout the certificate of urgency.

The applicant's founding affidavit was provided from pp 5 to 9. The founding affidavit said the late Catherine Chivanga acquired the stand around 2001 and attached a "card" from Ushewokunze Housing Co-operative as proof of acquisition. Receipts for subscriptions and some purchases of construction material were attached as proof of payment for the stand.

However, Catherine Chivanga died on 7 December, 2010. On 26 August, 2011 the applicant was appointed as executor. During the hearing, the applicant said he had occupied the stand in his personal capacity and not on behalf of the estate.

Whilst para 6.1 of the application told us that the late Catherine enjoyed peaceful and undisturbed possession, control and occupation of the stand since 2001, the application did not

indicate when the applicant in his personal capacity as opposed to the estate assumed peaceful and undisturbed possession and control of the stand. Peaceful and undisturbed possession are essential prerequisites to any application for spoliation relief, yet we were not told when the applicant obtained the peaceful and undisturbed control and possession.

Paragraph 7 of the applicant's founding affidavit alleged that around 20 September, 2017, the respondent forcibly took over control of the stand. We were not told the specific forceful actions by the respondent. We were then told that the respondent built a wooden cabin, "depriving me of possession control and occupation of the stand". The applicant advised that his two roomed cabin was demolished around 27 September, 2017.

The applicant concluded by saying he required spoliation relief as a matter of urgency.

However, the relief sought was not about restoration of applicant's possession, but the ejectment of the respondent.

The respondent opposed the application and raised the following points *in limine*:

(a) that the application did not comply with the form prescribed in the Rules and was therefore fatally defective.

(b) that the certificate of urgency was fatally defective for failure to give reasons for urgency.

(c) that the application was not urgent.

(d) that the relief sought was fatally defective.

The parties appeared in chambers and argued the matter. It was agreed by the parties that if the points *in limine* were found to be valid, there would be no need to proceed to determine the merits of the matter.

I considered both the papers filed and the submissions made during the hearing. On non-compliance with the rules, counsel for applicant conceded that the form used was incorrect. He however requested for condonation during his submissions. This request was opposed by the respondent. Respondent's counsel argued that since that point *in limine* was formally raised in the opposing papers, the applicant ought to have filed a written request for condonation in response to the written point *in limine*. He further argued that counsel could not allege mistakes by lawyers from the bar: He said an affidavit should have been given by the lawyer who made the mistake because allowing such statements from the bar was tantamount to allowing counsel to lead evidence from the bar.

While it is correct that non-compliance with the rules can be condoned, I agree with the respondent's counsel that an application for condonation for non-compliance should be

approached with seriousness. To start with, rules of court are there to be obeyed. So it follows that if one wants the non-compliance to be condoned, they need to show that they are serious. Once non-compliance is pointed out formally before a hearing, corrective measures should be taken before the hearing rather than wait for the other party to make submissions and then respond by saying please condone. In my view, the applicant's attitude did not indicate seriousness on his part. He is the one who approached the court urgently, asking it to give him urgent audience. Surely the moment an error was pointed out to him, serious formal corrective measures should have been taken. I therefore uphold the first point *in limine* which the applicant conceded to anyway. I find no basis to condone it since no affidavit was placed before me by the erstwhile legal practitioners explaining their alleged mistake.

As regards the certificate of urgency, no reasons were given as to why the matter should be dealt with as an urgent application. No dates were given to indicate when the need to act arose. No actual facts of what constituted "illicit and unlawful" dispossession was given, or the date when the applicant himself took possession. The inescapable conclusion from the certificate of urgency is that the certifying legal practitioner did not apply his mind to the case, he merely signed the certificate. This point *in limine* is therefore upheld

On urgency, clearly the applicant himself did not treat the matter with urgency. His application attached a letter dated 25 September, 2017 which confirmed that there was an ongoing dispute about the stands in question which had spilled into the courts as case No. HC4809/17. It appeared that dispute between the Co-operative Society and Crest Breeders, also known as Saturday Retreat, was the source of applicant's problems. It appeared there was a contest of possession or ownership of the stands between Crest Breeders on one hand and Ushewokunze Co-operative Society. The Co-operative Society allocated the stand to the applicant whilst Crest Breeders allocated the same stand to the respondent. Therefore Crest Breeders and the Co-operative Society are the two elephants fighting while the applicant and the respondents are the grass that is suffering. The applicant's affidavit then advised that respondent "took over the stand" illicitly and forcibly. He did not tell us what exactly the respondent did. He also said this happened around 20 September, 2017. This indicates that he was not sure about the date. The date is relevant because it took time and planning to erect a cabin. It is also relevant because the insinuations by respondent were that applicant was not in occupation of the stand. One would expect the applicant to remember the date he was dispossessed; if he was dispossessed.

The other point to note is that applicant, being aware of this dispute in the background, saw the respondent "illicitly and forcibly" taking over the stand around 20 September, 2017, but did nothing until 2 October, 2017, when he filed the urgent application. He did not tell us why he did nothing before 2 October, 2017. Taken cumulatively, the applicant's delay in filing the application and the absence of any explanation for the delay means the applicant himself did not rush to remedy the situation. So why rush the court to drop all other work and deal with his application?

On 27 September, 2017, the applicant's two roomed cottage was demolished. He reported the matter to the police, which was another remedy available to him.

Consequently, I have found no basis to treat this matter urgently. Even the dispute in the court in HC 4880/17 which applicant referred to is another indication that the case cannot be resolved through the present application.

The fourth point *in limine* was about the Draft Order. Indeed, the Draft order is fatally defective. The application is for spoliation relief, but the Draft Order reads as follows:

"Interim Relief Granted:

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

1. The Respondent and all those claiming through him are hereby ordered to vacate number 177 Ushewekunze Housing Co-operative, otherwise known as 177 New Cerney Township of Saturday Retreat Estate, Harare.

2. The Respondent and all those claiming through them are ordered to remove all their construction equipment and materials from number 177 Ushewekunze Housing Co-operative, otherwise known as 177 New Cerney Township of Saturday Retreat Estate, Harare, as well as demolish their wooden cabin therefrom upon service of this order, failing which the Sheriff is ordered to do so on their behalf."

The final Relief sought was for confirmation of the above order.

The above Draft order is clearly an eviction order. Eviction orders are properly granted pursuant to the issuance of eviction summons; not through filing an urgent application. Consequently, the point *in limine* on the Draft order being fatally defective is upheld.

In view of the validity of the points *in limine* raised by the respondents, there is no rope application before me.

The application is therefore struck off the roll.

The respondent asked for costs on the higher scale. No justification for costs on a higher scale was given. Therefore I see no basis for awarding costs on the higher scale. The applicant shall pay costs on the ordinary scale.

Hongwe, Dzimirai & partners, applicant's legal practitioners
Ndlovu & Pratt Law Chambers, respondent's legal practitioners