JEAN CHINGWENA
versus
HARARE MUNICIPALITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 June 2018 and 15 August, 2018

Urgent chamber application

S T Mutema, for the applicant
C Kwaramba, for the respondent

MANGOTA J: After disposed of this application which was set down through the urgent chamber book on 12 June, 2018 the applicant's legal practitioners addressed a letter to the High Court Registrar on 14 June, 2018. The letter reads, in part, as follows:

> "The application was dismissed and the reasons were given *ex tempore* in chambers. We kindly request that we be furnished with the reasons on an urgent basis….. We have instructions to appeal his Lordship's decision…."

I state hereunder the reasons for my decision.

The application falls in the realms of the remedy of *mandament van spolie*. The applicant is a resident of the respondent. She, together with other residents, enjoys the right of being furnished with water for domestic and other use by the respondent. She alleges that the respondent disconnected water supply from her property. She says it did so on 7 June, 2018. She states that its conduct was unlawful. She avers that the respondent embarked upon the same conduct twice in the past. She says, on each occasion that it did so, the court has always come to her assistance. It has, according to her, ordered it (the respondent) to reconnect the supply of water to her property [i.e. stand number 108, Rydale Ridge Park, Harare]. She states that the continued disconnection of water supply from her property constitutes her cause of action. She couched her draft order in the following terms:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> 1. That you show cause to this Honourable Court why a final order should not be made in the following terms:

(a) The respondent be and is hereby interdicted from disconnecting applicant from water supplies before liquidating its claims by way of obtaining a court order.
(b) The respondent be and is ordered to pay applicant $4955 in damages to the applicant.
(c) It is declared that each instance that the respondent shall illegally disconnect applicant from water supplies the same amount of damages as in clause "b" above shall automatically become due and owing notwithstanding other claims which may be made.
(d) It is declared that at each instance that the condition mentioned on paragraph "C" above shall be satisfied, the respondent shall be liable to pay costs of suit on attorney client scale.
(e) The respondent be and is hereby ordered to pay cost (*sic*) of suite *(sic*) on an attorney client scale.

2. INTERIM RELIEF GRANTED
Pending the finalisation of this matter, the applicant is granted the following relief.

(a) The respondent be and is hereby ordered to reconnect applicant to water supply services within 5 hours of this order.
(b) In the event that the respondent does not comply with paragraph one above, the applicant be and is hereby authorised to engage a plumber of choice to reconnect the same.
(c) The respondent be and is hereby ordered to supply the applicant with the cost of water per unit, the amount of water which constitutes that unit, interest rate chargeable per annum within 5 days of this order". [emphasis added]

The respondent opposes the application. It admits that it disconnected the supply of water from the applicant's property. It states that it did so because she did not pay her water bills. It insists that it acted within the confines of the law. It says the law allows it to disconnect water supplies from non-paying consumers of water who fall under its area of operation. It referred the court to s 8 of its Water By-Laws, namely Statutory Instrument number 164 of 1913 which it says supports its position. It avers that the Statutory Instrument is anchored on s 69 (2) (e) (i) of the Schedule to the Urban Councils Act, [*Chapter 29:15*]. It states that it forwarded several bills to the applicant who refused to pay for water she consumed. It avers that the billing it did on her property for the past two years was done on the basis of estimates because she did not allow its water-metre readers access into her property for purposes of obtaining actual metre readings. It insists that the two court orders which she obtained in the past were as a result of her effort to snatch at judgments. It states that, in the magistrates' court and under case number 25044/16 the applicant obtained an order through an *ex-parte* application. The decision, it says, was not on the merits. It avers that, in HC 9589/17, she obtained a default judgment when she was fully aware of its opposition to her application. It states that judgment was entered against it because it filed its notice of opposition purportedly outside the time which the rules of court prescribe. It says there was no proper service of HC

9589/17 on it. It insists that the application lacks merit. It moves the court to dismiss the same with costs.

I mention, as a starting point, the law which relates to the remedy of *mandament van spolie*. The remedy, it is trite, is not available to a possessor who is lawfully deprived of a right which he enjoys. It is granted to a possessor who is unlawfully dispossessed of such right or the thing which he is in possession of. The law discourages owners of property from resorting to self-help. It prohibits them from employing the law of the jungle when they proceed to assert their right of ownership of property which is in the hands of the possessor. It encourages them to do so through legally recognised means and, where they adopt such a course, their conduct remains without fault. No spolitaory relief can, therefore, be granted to a possessor who has been lawfully deprived of a thing he possess by its owner.

The current application will be decided in the context of the abovementioned observations. If the applicant was dispoiled as she alleges, the application will be considered in her favour. If contrary is the case, her urgent chamber application cannot hold.

An urgent application, such as the present one, must bear two very important features. These are:

(i) whether or not the application is urgent in the sense that when the harm or perceived harm occurred the applicant did not wait. He, in short, treated it with the urgency which it deserves- and

(ii) whether or not the applicant established a *prima facie* case which entitles him to an interim relief which he is moving the court to grant to him.

The applicant satisfies the first requirement. The event she complains of occurred on 7 June, 2018. She filed this application on the following day. She did not allow the matter to wait. She treated it with the urgency which it deserved. Her application cannot, therefore, be said to fall outside the realms of r 244 of the High Court Rules, 1971.

Whilst the issue of the date on which the event occurs as measured against the date that the application is filed is a matter of significant importance in urgent chamber applications, that alone is not the only determining factor which will persuade the court to grant the interim relief to the applicant. A consideration of whether or not he established a *prima facie* case for the relief which he is moving the court to grant to him remains a *sine qua non* aspect of the application.

The present application turns on one factor. The factor is whether or not the first respondent's conduct was lawful. Where it acted unlawfully in terminating the supply of water

to the applicant, the latter's prayer may well be granted without much ado. That is so as the respondent would have resorted to the law of the jungle when it moved to assert its right to the payment of water bills by the applicant. Where the opposite is the case, the application would be devoid of merit and would, as such, not see the light of day in court.

The respondent is a statutory body. It owes its existence to the Urban Councils Act [*Chapter 29:15*] "[the Act"]. Its operations are guided by the provisions of the Act and the regulations which are borne out of the same. One such regulation is Statutory Instrument number 164 of 1913 ["the Instrument"].

Section 8 (a) of the Instrument confers power on the respondent to discontinue supply of water to a consumer who fails to meet his bills for water he has consumed. It reads:

> "8. The Council may, by giving 24 hours' notice, in writing without compensation and without prejudicing its right to obtain payment for water supply to the consumer, discontinue supplies to the consumer
>
> (a) If he shall have failed to pay any sum which <u>in the opinion of the council</u> is due under these conditions or the Water-By- Law" [emphasis added].

The above cited section of the Instrument is anchored on s 69 (2) (e) (i) of the Schedule to the Act. The section reads:

> "2. Without derogation to the generality of sub paragraph (i), By – Laws relating to matters referred to in that subparagraph may contain provision for all or any of the following:
>
> (a) ……..
> (b) cutting off the supply of water, after not less than twenty-four hours' notice on account of:
> (i) failure to pay any charges which are due; or
> (ii) ……"

The Instrument, which finds support from the Act, confers a discretion on the respondent to discontinue the supply of water to any consumer who, whilst he falls under its area of operation, fails to pay for the water he has consumed. The only rider is that the respondent is enjoined to give to the consumer twenty-four (24) hours' written notice before it discontinues to supply water to him.

The applicant does not deny that it owes the respondent some money for the water she consumed prior to the disconnection of the same from her property. Her issue with the respondent is that she should not be billed on the basis of estimates. She insists that it should furnish her with a statement which shows:

(i) the cost of water per unit;

(ii) the penalty fee payable- and

(iii) the period for which it is calculated.

The applicant's contention is misplaced. Section 8 (a) of the Instrument allows the respondent to bill a consumer on the basis of an estimate. The phrase "*in the opinion of the council*" which appears in para (a) of s (8) of the Instrument speaks to the stated fact in an unambiguous manner. The phrase is as clear as night follows day. Its purpose is to address the mischief which persons who are of the mind of the applicant are likely to raise when they are billed on the basis of an estimate. The law allows the respondent to bill its consumers of water on the strength of estimates.

In casu, the respondent gave the applicant twenty-four hours written notice before it disconnected water supply from her property. It, in the premises, acted within the confines of the law. It did not, therefore, despoil her of her right to the water.

The respondent's unchallenged statement is that the applicant did not allow its water metre readers access into her property to obtain actual metre readings. It states that she only did so at a later stage. It avers that it furnished her with the actual amounts owing which were derived from the read metre and she refused to pay.

The applicant cannot be allowed to blow both hot and cold. She cannot insist on being furnished with the actual sum which she owes when she, in the same breadth, does not allow the respondent's metre readers to enter her property to obtain the actual metre readings.

The respondent's billing system which is based on estimates, it has already been observed, has the support of the law. It is not breaching any law when it acts as it did *in casu*.

The applicant cannot take herself outside what the law provides. She should comply with that law. The only option for her is to move to have the same struck off the statute book. Until she does that, however, she, like any water consumer who falls under the respondent's area of operation, must pay for the water she consumes as and when payment falls due. She should do so if she has to avoid the embarrassment of having water supplies disconnected from her property.

The applicant cannot rely on HC 9589/17 or on the *ex parte* application which she filed at the magistrates' court under case number 25044/16 as being supportive of her current application. The circumstances under which she obtained judgment in each case are hotly contested by the respondent. The same remain unknown to the court. What is known to it are the circumstances of this application.

The application is frivolous and vexatious. It should not have been made at all. It is a complete waste of the court's time. It is totally without merit. It does not establish a *prima facie* case in her favour. It is, accordingly, dismissed with costs.

Stansilous and Associates, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondent's legal practitioners