

SPENCER NYAKUDYA
versus
VIBRANIUM RESOURCES (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27 July & 6 August 2021

Urgent Chamber Application

T Chiturumani, for the applicant
B Biza, for the respondent

MANZUNZU J: This is a chamber application filed on urgency. The applicant seeks an order in the following terms;

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made as set out hereunder:-

1. Respondent be and is hereby interdicted from evicting and or locking out applicant from a property known as Block number 47622, Shamva ‘X’ mine in Shamva without an order of court.
2. Respondent to pay costs of suit at an attorney and client scale.

INTERIM RELIEF GRANTED

Pending the return date and finalization of this application:

- i. Respondent be and is hereby ordered to remove the fence that is erected and encircles a property known as Block number 47622, Shamva ‘X’ mine in Shamva upon receipt of this order failure of which the Sheriff for Zimbabwe or his lawful deputy be and is hereby ordered, empowered and directed to remove the fence.
- ii. Respondent and all his agencies who act on his behalf be and are hereby ordered to allow applicant access and entrance to the property known as Block number 47622, Shamva ‘X’ mine in Shamva upon receipt of this order.
- iii. Respondent be and is hereby ordered to remove and or ensure that all the security guards, security forces, police officers and all his agents are removed from the property known as Block number 47622, Shamva ‘X’ mine in Shamva.”

The respondent opposed the application and raised six points in *limine* the chief of which being that the matter is not urgent. There was a serious attack on the certificate of urgency. The applicant maintained that the matter is urgent. The question then is whether or not this is a matter which must be heard on an urgent basis. In other words does it meet the requirements of urgency?

The requirements for urgency are well known. It starts with rule 244 which provides that; “Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”

In *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (HC) it was stated, “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 dead-line draws near is not the type of urgency contemplated by the rules.”

In *Gwarada v Johnson & Ors*, HH 91/09 it was stated, “Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be.”

In *Documents Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H) the court said, “... 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.”

In *Mushore v Mbanga & 2 Ors* HH 381/16 the court held that there are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. The court stated; “By ‘time’ was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action... By ‘consequences’ was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis.”

An applicant has a duty to lay out in his founding affidavit why he says the matter is urgent. This is over and above what is expected of the certificate of urgency. In *Mayor Logistics*

(Private) Limited v Zimbabwe Revenue Authority CCZ 7/14 the court had this to say; “A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike. The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual.”

In summary, the applicant must act promptly when the need to act arises and must show that if the court does not hear the matter urgently he will suffer irreparable harm. Where the applicant fails to act timeously, he has a duty to give a reasonable explanation for the delay, otherwise in my view, even if it is shown that irreparable harm will be suffered, the matter cannot be heard on urgency. The applicant must treat the matter as urgent and this can be discerned from the action taken and how closely related such action is to the time when the apprehension of harm is realized.

A certificate of urgency assists the court in its determination of whether or not a matter is urgent. In *Condurago Investments (Pvt) Ltd v Mutual Finance (Pvt) Ltd* HH 630/15 the court underscored the importance of a certificate of urgency in the following words;

“An urgent application is an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue. That indulgency can only be granted by a judge after considering all the relevant factors and concluding that the matter cannot wait. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188.

The need for the certificate of urgency is therefore meant for the benefit of the generality of the hapless litigants who are about to be jumped in the queue but cannot speak for themselves because they are never consulted or given an opportunity to object. For that reason there is need for a judge to proceed with caution and due diligence so that justice may be done and be seen to be done. According to the well-established dictum of *Curlewis in R v Heerworth* 1928 AD 265 at 277, a judge must ensure that, “justice is done”

To assist the judge in his difficult task in dispensing justice at short notice and in the heat of the moment r 244 provides him with the benefit of the opinion of an officer of the court a trained legal practitioner who will have had the opportunity to peruse the case beforehand and formulate an opinion regarding the urgency of the matter. The certifying lawyer therefore carries a heavy responsibility in which he guides and provides assistance to the presiding judge. That duty must be discharged conscientiously with due diligence and due attention to the call of duty.”

The certificate of urgency is an assisting aid to the court and not a substitution to the discretion of the court. I have no doubt it plays a critical role. It must lay down the basis upon which the legal practitioner expresses his opinion of urgency.

The applicant states in his founding affidavit that the respondent sued him for eviction from Block number 47622, Shamva 'X' mine in Shamva under case number HC 2163/21 and that the matter is still pending before this court. The application for eviction was filed on 26 May 2021 and the applicant filed opposing papers on 1 June 2021. Applicant alleges that the respondent has now fenced the disputed area denying the applicant access. He only got to notice the fence on 21 July 2021 when he returned to the mine from Harare. He said he was absent from the mine as from 1 June 2021 when he went to see his family in Harare. It is the 21st July 2021 date which he says marks the need to act. He acted on 22 July 2021 when he filed the present application.

The respondent said following the cancellation of the applicant's mining certificates by the Provincial Mining Director the applicant was removed from the mining claims in June 2021. Respondent does not deny erecting a fence at the mine but said it was in compliance with the law. Respondent said applicant had sought to get a similar relief in an urgent application under case number HC 2171/21 which was ruled not urgent. Indeed there is an application filed on 11 May 2021 which was ruled not urgent on 12 May 2021. Applicant has kept silent about it. The interim relief sought in that application is for the withdrawal and removal of Police officers from the mine who allegedly raided, blocked, impeded, stopped and interfered with his mining activities. The applicant did not reveal that he was removed and barred from the mine by the Police as he stated in the HC 2171/21.

Mr *Biza* was able to demonstrate how untruthful the applicant was. In order for the court to determine when the need to act arose, the parties must be truthful in the narration of events. Applicant said he was away from the mine as from 1 June 2021 presumably on a visit to Harare to see his family. He said he came back to the mine on 21 July 2021 only to find it fenced. That cannot possibly be correct. It was shown that applicant was involved in a fracas with the Police at the mine on 23 June 2021 resulting in certain charges being levelled against him. On 29 June 2021 in the company of the local Member of Parliament he also visited the mine. The evidence is uncontroverted.

When then did the need to act arise according to the applicant whose evidence shows that he has been economic with the truth. Litigants who come to court on urgency have a duty to disclose all the facts surrounding their case including such facts which might be prejudicial to their case. It cannot be correct that the need to act arose on 21 July 2021. In the absence of when the need to act arose the court cannot rule in applicant's favour.

I was not persuaded by Mr *Chiturumani*'s submission that the applicant would suffer irreparable harm. He went in circles to say the least. For the first time we heard this was applicant's communal home and that the fence made him homeless leaving him with no clothes to wear in this unfriendly weather. The court had to remind Mr *Chiturumani* that the applicant said from 1 June 2021 to 21 July 2021 he was with his family in Harare. The issue of being homeless turned to be superficial. The truth of the matter is that applicant wants restoration to the mine, a place where the Ministry of Mines say he cannot do illegal mining activities.

Applicant says he left mining equipment which is meant for hire and therefore will lose hiring business. Mind you the applicant is not saying he wants to remove his equipment from site, which he has not claimed that he is prevented from doing so. He hides behind the application for spoliation. His evidence does not aver the requirements of spoliation. In another breath he seeks a prohibitory interdict, interdicting respondent from evicting him from the mine.

The certificate of urgency was attacked for its failure to meet the standard required of it. A certificate of urgency is not filed as a matter of routine which is the impression I got from Mr *Chiturumani*'s submission. It cannot just be a piece of paper filed to allow the Registrar to place the matter before a judge in terms of rule 244 but serves a purpose which is to give reasons why the matter must be treated as urgent. Because there is a demand to give reasons, it calls for a legal practitioner to apply his/her mind.

In *Chidawu and others v Shah & others* 2013 (1) ZLR 260 the court had this to say; "In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention

by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts. GILLESPIE J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in *General Transport & Engineering (Pvt) Ltd & Ors v Zimbank Corp (Pvt) Ltd* 1998 (2) ZLR 301, where he stated:

‘Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name.

.....It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency.’ [emphasis is mine].

What comes out of this case is that a legal practitioner, “is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. He has to apply his own mind and judgment to the circumstances and reach a personal view.”

In *casu*, a reading of the certificate of urgency does not meet this criteria. It regurgitates what is in the founding affidavit. It must be noted it is the same legal practitioner who filed a certificate of urgency in HC 2171/21. He ought to have realised the factual incongruence. In HC 2171/21 he acknowledged the applicant was in peaceful and undisturbed possession of the mining claim before the Police raided, barred and blocked him from entering. He said the need to act in that case arose on 10 May 2021.

In *casu*, the legal practitioner now says it is the fencing which has despoiled the applicant of his access to the mining claim. He should have realized that the two were not compatible and must have refused to issue his certificate without explanation. It makes the certificate of urgency fatally defective in that it shows the author did not apply his mind. A

legal practitioner who issues a certificate of urgency owes a duty to court as an officer of this court. In HC 2171/21 the applicant said urgency was based on the fact that he was barred by the Police. Having failed on urgency in that respect he now claims the fence has barred him. “There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency.” CHATIKOBO J, as he then was, observed in the *Kuvarega* case (*supra*). The bottom line is that this matter is not urgent.

Disposition:

1. The application is not urgent.
2. The matter is struck off the roll of urgent matters with costs.

Chiturumani Zvavanoda Law Chambers, applicant’s legal practitioners
Mhishi Nkomo Legal Practice, respondent’s legal practitioners