KERSHELMAR FARMS (PVT) LTD

And

ZEPHANIAH DHLAMINI

And

SIPHOSAMI PATRICK MALUNGA

And

CHARLES MOYO

Versus

MSWELANGUBO FARMS (PVT) LTD

And

OBERT MPOFU

And

SIKHANYISIWE MPOFU

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 8 AND 10 FEBRUARY 2022

Urgent Chamber Application

J Tshuma, for the applicants
Advocate S Siziba with B Ndove, for the respondents

KABASA J: This is an urgent chamber application for leave to execute pending appeal.

The background facts are these:-

The applicants obtained judgment (HB 280/21) in their favour in case number HB 1917-21. The respondents were found to have despoiled the applicants when they took occupation of 145 hectares at Esidakeni Farm on the basis of an offer letter but without following due process with regards to the eviction of the applicants who were in peaceful and undisturbed

occupation of the property. The effect of the judgment was to order the respondents' eviction from the farm on the basis that they ought not to resort to self-help.

Aggrieved by this decision the respondents noted an appeal to the Supreme Court under SCB 69/21. The effect was to suspend the order granted in HB 280-21.

The applicants subsequently made this application which seeks to allow execution pending the determination of the appeal.

The application was brought on an urgent basis supported by a Certificate of Urgency. The urgency is as articulated in the founding affidavit and it is this:-

> "This matter is urgent as the applicants have crops that have been planted, at various stages of maturity which require attention and constant irrigation. Due to the interruptions caused by the respondents, applicants stand to lose significantly should the crops fail.
>
> The matter cannot wait for the ordinary court process as the treatment of applicants' crops is at a crucial stage and should we continue to experience interruptions of our farming activities, applicants stand to lose the crops that have been planted. Should applicants approach the courts in the ordinary manner, the relief will be moot as applicants will have likely lost most of our crop by the time the matter is heard."

The respondents opposed the application and raised preliminary points. These are:-

> The application is fatally defective for want of form. The form used ought to have been Form 23 not Form 25. The lack of compliance with the rules of court makes the application a nullity.

Mr Tshuma for the applicants held a different view. Counsel argued that in an urgent chamber application which is supported by a Certificate of Urgency, the process is Judge driven, making the procedural provisions articulated in Form 23 unnecessary.

I am of the considered view that rules of court are not to be slavishly followed just for the sake of it. Granted rules are there to serve a purpose, otherwise why have them. That said however it is important not to stifle court proceedings by putting emphasis on form over substance, especially where there is no prejudice to the other party.

In *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) and 3 Others* HH 446-15 MATHONSI J (as he then was) had this to say:-

> "I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designed to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in form 29 B when they are set out in abundance on the body of the application is to worry about form at the expense of substance …"

In casu Form 25 was used when the application was to be served on other interested parties.

The purpose of using Form 23 serves to inform the other interested parties of what they are to do should they intend to oppose the application and when to file such opposition. It also tells such interested parties the consequences of failing to comply with these requirements.

MAKONESE J in *Kershelmar Farms (Pvt) Ltd and 3 Others* v *Dumisani Madzivanyati* HB 190-21 dealt with a similar argument. The learned Judge had this to say:-

> "It is trite that where an urgent chamber application is instituted there is no need to insert the *dies induciae* on the application. Ordinarily, urgent chamber applications are served on interested parties unless they are filed in accordance with the provisions of Rule 60 (3) (a) to (e). Once an urgent chamber application is placed before a Judge, the Judge dealing with the matter may decide to hear the matter, in which event, he will cause the matter to be set down for hearing, on notice to all interested parties. In terms of Rule 60 (8) the Judge is empowered to direct how the matter should proceed … The rules are designed to ensure that litigants are heard and that they be given the opportunity to advance their argument. Failure to use Form 23 in urgent (applications) where such application is served on the affected party does not per se render the application defective."

I respectfully agree with these remarks. The respondents *in casu* were duly served with the application and the Judge directed that it be set down for hearing on a particular date.

The respondents were not prejudiced in any way and the many procedural formalities stated in Form 23 were observed as the respondents were able to file their opposing papers and subsequently argue the matter on the date set by the Judge.

I therefore hold that to argue on the use of Form 25 and not Form 23 is really putting emphasis on form rather than substance.

The point *in limine* was therefore not properly taken and it is accordingly dismissed.

The second point *in limine* relates to the absence of a founding or supporting affidavit from the 3rd applicant. The argument is that this applicant is therefore not before the court and should be excluded from the proceedings.

The fact is there are 4 applicants and the other 3 filed founding and supporting affidavits, respectively. Whether the 3rd applicant is excluded or not makes no difference. The application will still be heard and determined. This applicant is also part of the proceedings in HB280/21, the judgment which is sought to be executed pending appeal.

This point *in limine* is not dispositive of the matter at all and I would say it was just taken for the sake of it. Points *in limine* ought to be taken for a purpose. This is not so *in casu*. Granted where a party is joined to proceedings and a founding affidavit is filed in support of the application, whoever else associates with such application must file a supporting affidavit to that effect. There are however more than one applicant and the failure by the 3rd applicant to depose to a supporting affidavit does not dispose of the matter, as it is still properly before the court. The point *in limine* was ill-taken and is accordingly dismissed.

I turn now to the third point *in limine*. This point is on urgency. I must say I do not intend to unnecessarily detain myself on the arguments that:-

(a) The appeal against the judgment in HB 280-21 has the effect of suspending that judgment.

This is the common law position and it is a given. Only when such common law position is ousted by statute can an appeal not have the effect of suspending the judgment being appealed against. I do not see how this can be argued in support of the contention that the matter is not urgent.

(b) The disputed property was acquired by the Government more than a year ago on 18th December 2020.

This issue was ventilated in HB 280-21 and has no bearing on the application the court is now seized with. So too is the issue of the time within which the applicants were supposed to vacate the farm. These are the very issues which the Supreme Court is expected to pronounce itself on, that is whether a holder of an offer letter has the right to resort to self-help without following due process. The due process being either prosecution of the applicants in terms of section 3 of the Gazetted Land (Consequential Provisions) Act, Chapter20:28 which is then followed by the issuance of an eviction order by the Criminal Court presiding Judicial Officer or eviction through the Civil Court.

This has nothing to do with the issue of whether or not this application should be heard on an urgent basis.

There is however the issue of whether the matter is urgent such that if the applicants are not allowed to jump the queue the relief they seek will become irrelevant.

Advocate Siziba submitted that the considerations of urgency in the initial application for spoliation are not the same in this application to execute pending appeal. I am persuaded by this argument.

This is so because the respondents are saying the portion of land they are occupying was not being utilised by the applicants and there are therefore no crops which are likely to die should the applicants not be allowed access to them. This portion of land was occupied on 5th December 2021 and it therefore cannot be said in February 2022 there are crops on this land whose future is threatened if relief is not granted on an urgent basis.

I take the view that the fact that an appeal has the effect of suspending the judgment being appealed against should never be taken lightly. It is meant to maintain the position of the parties until the determination of such appeal.

I would say to allow execution pending appeal is an extra-ordinary relief which ought to be carefully considered and on an urgent basis if the facts are such that failure to do so would result in irreversible harm to the applicant.

MAKARAU JP (as she then was) in *Document Support Centre (Private) Ltd* v *T.F Mapuvire* 2006 (2) ZLR 240 had this to say:-

> "… a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

If the respondents have been on this portion of the land for close to 3 months, I am inclined to agree with *Advocate Siziba* that they are not directly interfering with the operations of the applicants to the extent of causing such harm as to necessitate the hearing of this application on an urgent basis.

This is not to suggest that commercial urgency is no urgency where it has been shown that a failure to hear the matter on an urgent basis would result in irretrievable loss to the applicant.

As was stated by MAKONESE J in *Merspin Ltd* v *Cecil Madondo N.O* HB 276-18:-

> "In matters involving commercial urgency, the court ought, in my view to assess the potential prejudice to an affected party."

In casu I am not persuaded that the occupation of this portion of the farm since December 2021 will result in such harm as to warrant immediate relief in the form of an urgent hearing of the matter.

In *Triple C Pigs (Partnership) and Another* v *Commissioner General Zimbabwe Authority Revenue* HH 7-2007 GOWORA J (as she then was) quoted, with approval, GILLESPIE J in *General Transport and Engineering P/L and Others* v *Zimbank Corporation P/L* where the learned Judge said:-

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance, where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it."

I am not persuaded on the facts, that any subsequent relief the applicants would get will be hollow.

"Naturally every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is

being delayed and thus denied. Equally, the courts in order to ensure delivery of justice, would endeavour to hear matters as soon as is reasonably practicable" (Triple C Pigs and Anor v Commissioner General, ZRA. (supra))

It is therefore accepted that every litigant would want their matters heard on an urgent basis because they deem them urgent but the court has to be persuaded that such litigants deserve to jump the queue if whatever relief they subsequently get is to have any meaning. It is a discretion the court has to exercise judiciously.

I am of the considered view that a case for urgency has not been made *in casu*. I therefore decline to exercise my discretion in favour of the applicants.

The respondents have asked for punitive costs. I see no justification for such. There is nothing the applicants have done which deserves censure by an award of punitive costs. Whilst the norm is that costs follow the cause, the circumstances of this matter persuade me not to make an award for costs.

In the result I make the following order:-

1. The point *in limine* that the application is not urgent is upheld.
2. The application is accordingly struck off the roll of urgent matters.
3. There shall be no order as to costs.

Webb Low & Barry Inc. Ben Baron & Partners, applicants' legal practitioners
Ndove & Associates, respondents' legal practitioners