GARDNER MAGANDI
versus
FELIX PAMBUKANI

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 21 February, & 30 March, 2022

Urgent Court Application

Adv. L. Uriri with Mr. K. Ncube, for the applicant
Mr. E. Mubaiwa, for the respondent.

DEME J: The applicant has approached this court seeking the relief couched in the following way:

> "1. The Applicant and his workers be and are hereby authorised and empowered to forthwith enter subdivision 2, Wakefield Farm, Chegutu and collect the following items that belong to him:
>
> -A 35 KVA diesel generator.
>
> -Flue pipes.
>
> -Tobacco clips.
>
> -Grading tables and lights.
>
> -Blower fans and thermostat.
>
> -20 tonne steam boiler.
>
> 2. The Respondent be and is hereby restrained and interdicted from denying the applicant and his workers access to the farm to collect the items listed in paragraph (1) above.
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> 3. In the event of the Respondent failing to comply with paragraph (2) above, the Sheriff of the High Court Harare, be and is hereby authorised and directed to use any lawful means to assist the applicant to gain access to the aforesaid farm and collect the property items listed in paragraph (1) above.
>
> 4. The Respondent to pay costs of suit on the legal practitioner and client scale."

I will proceed to give a summation of the facts. The Respondent is the holder of an Offer Letter for Subdivision 2, Wakefield farm which is in Chegutu, (hereinafter called "the farm"). According to the Applicant, he entered into the verbal lease agreements with the Respondent which saw the Applicant being allowed to use the portion of the farm for an agreed fee of US$ 40 000. The Applicant further averred that the lease agreement should expire in May 2022.

The Respondent opposed this averment. He alleged that the parties never entered into the lease agreement of any nature with the Applicant. The Respondent also averred that he is challenging the existence of the lease agreement in HC 5315/21.

The Applicant further alleged that he brought to the farm items listed above. On the other hand, the Respondent opposed this. According to his averment, the items claimed by the Applicant are permanent farm fixtures and fittings which were valued by the Ministry of Lands during the processing of the ninety-nine year lease agreement. He further alleged that the flue pipes are part of the tobacco barns used for curing of tobacco. The Respondent also affirmed that the Applicant was hiring per season, from him, the flue pipes and the barns. He also averred that the Applicant has failed to prove that he owns the equipment in dispute. According to the Respondent, the Applicant neglected to pay electricity which he consumed during his stay at the farm.

According to the Applicant, the parties to the agreement developed a dispute which saw him being kicked out of the farm on 2 August 2021. The Respondent disputed this assertion. According to the Respondent, the Applicant secretly left the farm after he had instituted an action against the Applicant under case number HC 5315/21. He further contended that if the Applicant had been kicked out of the farm, he wonders why he did not apply for spoliation order. In reply to the issue of spoliation order, the Applicant asserted in his answering affidavit that he is seeking the vindicatory order instead in the present proceedings as he is the owner of the property claimed.

The Applicant further averred that, on 23 January 2022, his workers attempted to collect items left at the farm. The Applicant further alleged that his workers were denied entry into the farm. According to the Applicant, the Respondent advised the Applicant's workers that they were not to remove any item from the farm.

The Respondent vehemently opposed this assertion. He averred that the events alleged by the Applicant never took place. According to the Respondent, the property which the Applicant allegedly wanted to collect from his farm is with the Applicant. He also stated that he is claiming the same items from the Applicant.

The Applicant also maintained that his legal practitioners approached the Respondent's legal practitioners who did not respond to the correspondence. The Applicant also alleged that this forced him to file the present application. He further asserted that he wants to use the items for purposes of curing his tobacco at another farm. If he is not able to get his items back, the Applicant affirmed that his tobacco business will be severely affected.

He further claimed that he will face incurable and irrecoverable financial loss if the order sought is not granted.

The Respondent averred that it is not correct to say that his legal practitioners ignored the Applicant's call for dialogue. He alleged that his legal practitioners called Adv. Uriri with a view to amicably settle the matter. According to the Respondent, The Respondent further stated that he was surprised by the present application as it was filed before the finalisation of the dialogue. The Respondent also averred that the Applicant was supposed to disclose this attempt made by the parties to resolve the dispute so that the court would discover that he had jumped the gun. The Respondent also maintained that it is wrong for the Applicant to allege non-response by the Respondent's legal practitioners when this application was filed before the round table discussions that had been agreed to by the legal practitioners for both parties.

The Respondent raised some points *in limine*. Firstly, he averred that the matter is not urgent. The Respondent further stated that the Applicant left the farm in August 2021 only to approach this court in January 2022. According to the Respondent, the need to act arose in August 2021. He further alleged that the Applicant offered no explanation about why he took so long to harness the situation. The Respondent also alleged that the Applicant planted tobacco in November 2021 and he wondered why the Applicant could not take action even at the time of planting tobacco. The Respondent motivated the court to remove the present application from the urgent roll for want of urgency.

The Applicant, in his answering affidavit, insisted that the present application is urgent. He averred that the facts giving rise to this application is the Respondent's refusal to grant access to him (the Applicant) and his workers to the farm which happened on 23 January 2022. The Applicant maintained that the need to act arose on 23 January 2022 and not on 2 August 2021. According to the Applicant, the Respondent is not opposing that he refused access to his workers on 23 January 2022.

Secondly, the Respondent also alleged that the form used by the Applicant to file the present application is alien. He further averred that the Applicant did not use Form No. 23. He further asserted that there is no requirement for the listing of the grounds of the court application on form No. 23. According to the Respondent, the present application is a nullity for want of compliance with the Form. The Respondent moved the court to strike the matter from the roll.

In response to the issue of failure to comply with the Form, the Applicant maintained that the present application is in compliance with the Rules. The Applicant also stated that using the chamber application form instead of the court application form does not make the present application dismissible. He referred the Court to Rules 36(17) and 58(13) of the High Court Rules, 2021. The Applicant further affirmed that the Respondent has not proved any prejudice that he has suffered as a result.

Thirdly, the Respondent also attacked the present application due to the Applicant's failure to disclose material factors. According to the Respondent, the Applicant has failed to disclose that the parties are locked in another dispute where the Respondent is claiming some of the equipment listed by the Applicant in his draft order. The matter pending was instituted by way of summons under HC 5315/21. The Respondent further averred that the Applicant failed to plead to the merits in the pending case. Instead, the Applicant chose to file the present application, according to the Respondent.

In response to the issue of material non-disclosure alleged by the Respondent, the Applicant, in his answering affidavit, asserted that it is common cause that the property belongs to him as can be confirmed by discussions held by legal practitioners for both parties. The Applicant further alleged that the matter under case number HC 5315/21 is a public record which can be referred to by the court. He also maintained that there is no dishonesty of any nature that can be deduced from his conduct.

In his answering affidavit, the Applicant also raised a point *in limine*. He affirmed that the Respondent, at one time disowned his Opposing Affidavit. He further maintained that the Respondent highlighted that he did not depose to the Opposing Affidavit. According to the Applicant, the Respondent disowned the signature on the Opposing Affidavit. The Applicant also asserted that the Respondent stated that the Opposing Affidavit was signed by the clerk, namely Rusike, in the employ of the Respondent's Legal Practitioners.

I will firstly deal with the Applicant's point *in* limine as, if it is upheld, it has the potential of disregarding the Respondent's opposing affidavit. The Applicant's assertion which he stated in his point *in limine*, in the absence of direct evidence, remains hearsay evidence. Our law is certain that hearsay evidence is inadmissible in the affidavit subject to exceptions. In the case **of *Jean Hiltunen v Osmo Hiltunen*[1], MAKARAU JP as she then was held that:**

[1] **HH 99-2008.**

> "in my view, the legal position remains clear that hearsay evidence is inadmissible in affidavits filed with court applications unless it is evidence of a statement made by a person, where such a statement would have been admissible had it been adduced as direct evidence by the maker of the statement. Hearsay evidence may be admissible, as per the practice of this court, in urgent and interlocutory applications where an explanation as to why direct evidence cannot be led is tendered and the basis of belief and information by the deponent is fully given in the affidavit. I am fortified in my view by the remarks of BEADLE CJ in ***Johnstone* v *Wildlife Utilization Services (Pvt) Ltd 1966 RLR 596 (GD*)** where he dealt with the admissibility of hearsay evidence in motion proceedings in the following terms at page 597I-598A:
> "It is accepted, in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence, given in affidavit form in such applications, is not necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understand our practice, it is this: first, the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable; second, the court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form."

In the answering affidavit placed before the court, there is no justification why direct evidence from the Respondent cannot be obtained. Thus, it is difficult for me to admit the evidence of the Applicant where he averred that the Respondent disowned his opposing affidavit. In my view, admitting this piece of evidence would cause irremediable prejudice to the Respondent if it later turns out to be untrue. For these reasons, I dismiss this point *in limine.*

I will now shift my attention to the points *in* limine of the Respondents. The Respondent challenged the present application for want of compliance with the proper form. In response, the Applicant referred the court to rule 36(17) of the High Court Rules, 2021 which provides as follows:

> "(17) No technical objection shall be raised to any pleading on the ground of any alleged want of form."

Rule 36(17) falls under Part V of the High Court Rules, 2021. Part V of the Rules is for pleadings generally for action procedure. This provision is equivalent to Rule 58(13) save to highlight that the former is for action procedure while the latter applies to application procedure. In my view, Rule 36(17) of the High Court Rules, 2021 does not apply to the present matter as it had been brought by way of application procedure.

In addition, the Applicant also referred the Court to Rule 58(13) of the High Court Rules, 2021 which provides as follows:

> "(13) Without derogation from rule 8 but subject to any other enactment, the fact that an applicant has instituted—

(a) a court application when he or she should have proceeded by way of chamber application; or
(b) a chamber application when he or she should have proceeded by way of a court application;
shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that—
(c) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and
(d) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs."

Thus, it is important to note that where the Court or Judge is satisfied that there is no prejudice suffered by the Respondent through the use of Form No. 25 (chamber application form) instead of Form No. 23 (court application form), the Court or the Judge may condone the error in terms of the High Court Rules[2]. Further, such error must not on its own constitute a ground for dismissal of the application that has been filed through another Form[3].

The court has, on several occasions, shown its displeasure to legal practitioners who raise unnecessary technical objections. In *Gardiner* v *Survey Engineering (PTY) Ltd*[4], the court associated itself with the remarks of CLOETE J (as he then was) in *Uitenhage Municipality* v *Uys*[5], wherein the learned judge stated that:

> "The principle has repeatedly been laid down in our courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side (see *The Civil Practice of the Superior Courts in South Africa 2 ed by Herbstein and van Winsen* at 356 and the authorities there cited.)"

In *Trans-African Insurance Co. Ltd* v *Maluleka*[6], SCHREINER JA says:

> ".. technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

Further, CHITAKUNYE J. as he then was, in the case of *Infralink (Pvt) Ltd* v *Sheriff of Zimbabwe N.O. and Others*[7], made the following remarks:

> "Whilst the raising of irregularities is not objectionable it is important to demonstrate the prejudice occasioned by such irregularities. This should not, however, be taken as a licence for lackadaisical approach to pleadings by legal practitioners."

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[2] See Rule 58(13)(c) of the High Court Rules, 2021
[3] See Rule 58(13) of the High Court Rules, 2021.
[4] 1993(3) SA 549.
[5] 1974 (3) SA 800 (E) at

805D-F.
[6] 1956 (2) SA 273 (A) at 278.
[7] HHC1-18.

In my view, there is no prejudice suffered by the Respondent as a result of the irregularity complained of. The Respondent did not advance such prejudice in his papers.

Further, the present application is provided for in terms of Rule 59(6) of the High Court Rules, 2021 which provides as follows:

> "(6) The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, exclusive of the day of service, plus one day for every 200 kilometres or part thereof where the place at which the application is served is more than 200 kilometres from the court where the application is to be heard.
> Provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period."

Therefore, the urgent court application is not alien to our jurisdiction. It is recognised by the Rules. Thus, in my view the application is properly before the court. For this reason and lack of evidence for prejudice suffered by the Respondent as a result of the form used by the Applicant to file the present application, I find no merit in this point *in limine*. I, therefore, dismiss the point *in limine* raised by the Respondent.

I will now turn to the point *in limine* of material non-disclosure raised by the Respondent. The Respondent alleged that the Applicant failed to disclose a material fact that there is a pending dispute where the Respondent is claiming the same property which is being claimed by the Applicant under case number HC 5315/21. . Our courts have emphasised the need for material Disclosure in a number of cases. In *Graspeak Investments (Pvt) Ltd* v *Delta Operations (Pvt) Ltd and Another*[8], the court held that:

> "an urgent application is an exception to the audi alteram partem and, as such, the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that a matter is urgent. Although the court has discretion to grant or dismiss an application even where there is material non-disclosure, the court should discourage urgent applications, whether ex parte or not, which are characterised by material non-disclosure, mala fides or dishonesty…"

Further, in the case of *Sergeant Mhande 04737T and Another* v *The Chairman of the Police Service Commission and Others*[9], the Court postulated the following comments:

> "That deliberate attempt to withhold information does not project the applicants in good light. Our courts are not keen to grant favourable orders to litigants who withhold vital information to it."

[8] 2001 (2) ZLR 551 (H)
[9] SC63-18.

NDOU J, in the case of *Anabus Services (Pvt) Ltd* vs *Minister of Health and Others*[10], remarked as follows:

> "The courts should in my view always frown on an order whether *exparte* or not sought on incomplete information. It should discourage non-disclosure, *mala fides*, or dishonesty."

The Respondent claimed that the Applicant failed to disclose that there is a pending matter. Despite insisting that he is claiming the return of the same property, he failed to refer the court to appropriate paragraphs of the summons and declaration where he is claiming the same property. The Respondent also affirmed that some of the items claimed by the Applicant are permanent farm fixtures which have been valued by the Ministry of Lands during assessment of whether he qualifies to be granted lease agreement. However, the Respondent failed to tender evidence to this effect. In the absence of such vital information, I find no favour with the point *in limine*. I accordingly dismiss this point *in limine.*

I will now address the urgency. The Respondent affirmed in his opposing affidavit that the matter is not urgent. This point was also reinforced by the Respondent's heads of argument. Whether or not the matter is urgent is the issue that has been clarified by our jurisprudence. In the case of *Kuvarega* v *Registrar General and Anor*[11] urgency was extensively defined in the following way:

> "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 near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

Further, in the case of *Seventh Day Adventist Association of Southern Africa* v *Tshuma*[12], the court held that:

> "It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis……. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage on other litigants by jumping the queue, and have its matter given preference over other pending matters……"

In addition, the nature of the relief sought and cause of action is very key in determining whether or not the matter is urgent as enunciated in the case of *Document*

[10] HB88-03
[11] 1998 (1) ZLR 188 (H).
[12] HB213-20.

Support Centre (Pvt) Ltd v *Mapuvire*[13]. MAKARAU J. (as she then was), in making her determination in the case of *Document Support Centre (Pvt) Ltd supra* held that:

> "Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications."

In the case of *Gwarada* v *Johnson and Ors*[14] the Court held that time is of essence in that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats. See also the case of *Mukwindiza* v *Sithol*e and Anor[15].

In casu, the Applicant moved out of the farm on 2 August 2021. According to the Applicant, the need to act arose on 23 January 2022 while the Respondent is of the view that the need to act arose on 2 August 2021. I do agree with the Respondent's view. The founding affidavit together with the certificate of urgency do not sufficiently explain the delay in bringing this matter before the court especially in light of the Applicant's version of events that he was kicked out of the farm by the Respondent on 2 August 2021. The Applicant had a long wait before instituting this matter that is in excess of five and half months which amounts to inordinate delay. In my view, logic and common sense demand that the Applicant would at least promptly attempt to recover the property in dispute at the time of his exit from the farm. Facing real threat to the ownership of his property, the Applicant did not react to the course of events with necessary and appropriate rapidity at the time of his departure from the farm. Thus, the Applicant cannot be allowed to gain an advantage over other litigants as he demonstrated a lackadaisical and sluggish approach in seeking protection from the court. In the circumstances, I uphold the point *in limine* for lack of urgency.

Accordingly, it is appropriate that this application be struck from the urgent roll. With respect to costs, the Respondent had prayed for the dismissal of the application with costs on a higher scale. Costs ordinarily follow the outcome. However, I am not convinced that such costs must be on a higher scale as doing so would deter people from enjoying the fundamental right of access to justice. Costs on an ordinary scale are reasonably sufficient.

Consequently, it is ordered that the application be and is hereby struck from the urgent roll with costs on an ordinary scale.

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[13] 2006 (2) ZLR 240
[14] 2009 (2) ZLR 159.
[15] HMT 21-21.

Kossam Ncube and Partners, applicant's legal practitioners.
Jarvis Palframan Legal Practitioners, respondent's legal practitioners.