JOHANNE MASOWE YECHISHANU
and
ONWELL VENGESAI
and
AKSON KANDIRA
versus
CITY OF HARARE
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 4 June 2019 & 1 August 2019

Court Application

T.E Mudambanuki, for the applicants
RN Muchenje, for the 1st respondent

MANZUNZU J: This application was filed on urgency with the applicants seeking the following order;

"TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms;

1. That pending determination of the chamber application for reinstatement of appeal, the 1st and 2nd respondents, their agents or any other official be and are hereby interdicted from evicting applicants from Stand 10428, Sebakwe Road, Glen Norah Township Harare.
2. That the part opposing shall bear costs of this application on the higher scale of attorney and client.

INTERIM RELIEF SOUGHT

Pending determination of this matter applicants are granted the following relief;

3. The 1st and 2nd respondent, their agents or any other official be and is hereby interdicted from evicting applicants from Stand 10428, Sebakwe Road, Glen Norah Township Harare."

The first respondent opposed the application and argued that the matter was not urgent.

After hearing parties on the issue of urgency I ruled that the matter was not urgent and issued the following order;

"1. The matter is not urgent.

2. The application is struck off the roll of urgent matters with costs."

The applicants have appealed against the ruling and the Registrar of the Supreme Court has asked for the reasons. These are they.

I will give a quick summary of the background of this case leading to the present application. On 31 October 2017 in HC 8396/16 the first respondent obtained default judgment against the applicants for the ejectment of the applicants from Stand No. 10428, Sebakwe Road, Glen Norah, Harare

In HC 10554/17 filed on 10 November 2017 the applicants applied for the rescission of the default judgment. The application for rescission of judgment was dismissed for want of prosecution on 30 January 2019. The applicants filed an appeal against the decision of 30 January 2019 under case No. SC 54/19.

The appeal in SC 54/19 was dismissed on 11 April 2019 when the applicants failed to pay costs for the preparation of the record. The letter by the Registrar of the Supreme Court which was served on the applicants' legal practitioners on 23 April 2019 reads;

"Your Ref TEM/fcm/13/18

Our Ref: SC 54/18

11 April 2019

Jarvis.Palframan
Appellant's Legal Practitioners
1st Floor, Eastern Wing
Coal House
HARARE

RE: JOHANNE MASOWE YECHISAHNU AND 2 OTHERS VS CITY OF HARARE

Reference is made to the Notice of Appeal which you filed on 8 of February 2019.

It is noted that you did not make any arrangement for the preparation of the record within the specified time in subrule (1) of r 46 of the Supreme Court Rules, 2018.

In terms of Sub-rule (5) of r 46 of the aforementioned rules, the appeal is deemed to have lapsed and has been abandoned.

For: REGISTRAR"

On 7 May 2019 the respondent instructed the Sheriff to carry out the ejectment of the applicants based on the warrant issued on 3 May 2019.

On 29 May 2019 the Sheriff served the applicants with a notice of eviction based on the default judgment in HC 8396/16.

On 31 May 2019 the applicants filed the present application. On the same day the applicants also filed a chamber application for the reinstatement of the appeal in SC 54/19.

The Law

The requirements of urgency are now well settled.

In the case of *Kuvarega* v *Registrar General & Anor*, 1998 (1) ZLR 188 at 193 CHATIKOBO J, (as he then was) had this to say:

> "What constitutes urgency is not only the imminent 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. 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."

It is important, always, to ascertain as to when the cause of action arose as a measure to determine if applicant acted timeously and if not what the explanation thereof is. In the *Kuvarega* case (*supra*) the learned judge expressed concern with legal practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. I am sorry to say this problem still persists to the present day. In *casu*, the certificate of urgency gives me the impression that the certifying legal practitioner, that is if he is the author of the certificate, did not apply his mind at all. A certificate of urgency must lay out the events and time frames against which urgency can be tested. In para 5 of the certificate of urgency it says, "Despite the pending suit the first respondent on 29 May 2019 instructed the second respondent to proceed with eviction" That is not factually correct because instructions to the Sheriff were on 7 May 2019 and the Sheriff carried out the instructions on 29 May 2019. This was before any application for reinstatement of the appeal was filed. There was therefore no pending suit. This kind of certificate of urgency does not assist the court as it ought to do.

The court can however consider the evidence in the founding affidavit on urgency.

The question now is when did the need to act arise? The applicants' founding affidavit says the matter is urgent because they were served with an eviction notice on 29 May 2019 and that the actual eviction was earmarked for 3 June 2019. This is the same line of argument by Mr Mudambanuki for the applicants. He relied on the authority of *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe & Ors*, HH 446-15 which castigated the issue of raising a preliminary issue on urgency as a matter of routine. However, the circumstances of that case are different from the present case.

Three other authorities were also referred to but the matter still remains as to when the need to act arose. Applicants suggest it was the 29 May 2019 when notice of eviction was served. I disagree. The reason being that applicants knew through their legal practitioners that there was no appeal pending before the Supreme Court on 23 April 2019 when a letter from the Registrar of the Supreme Court was served on their legal practitioners. They ought to have known that the first respondent was at liberty to enforce the default judgment of 31 October 2017 ordering their eviction. The intention to enforce that default judgment could not have escaped the applicants because first respondent opposed the application for rescission of the default judgment. Not only that, first respondent went ahead to successfully apply for dismissal of the application for rescission for want of prosecution. That is not the behaviour of a litigant who does not want to see the execution of a judgment in its favour go through. The need to act arose on 23 April 2019. This application was brought on 31 May 2019. The 29 May 2019 when the eviction notice was served can only be a day of reckoning.
Even then one needs to look at the explanation by the applicants for the delay from 23 April 2019 to 31 May 2019.

Gleaning from the founding affidavit the second and third applicants say they went on a 3 month pilgrimage though they do not say from which date but said they arrived in Zimbabwe on 30 May 2019 from Israel.

They remained silent as to when they went to Israel. Copies of their passports were attached which show their absence from 26 May 2019 to 30 May 2019. As for the period between 23 April 2019 to 26 May 2019 the applicants said they were on a pilgrimage.

Their legal practitioners said they were not accessible to them. This is despite full knowledge that they had a case pending in the Supreme Court.

They resurfaced on 30 May 2019 and now want everyone to play tune to their convenience. They created a situation for themselves from which they want to benefit. A

notice to their legal practitioners that the appeal was dismissed is due notice to the applicants. We did not hear them say first applicant was also on pilgrimage. This is a self-created urgency. While it is not a determining factor, the applicants have a history of non-compliance with the Rules in this case. A default judgment was granted against them because they had failed in one way or the other to comply with the Rules. The application for rescission of default judgment was dismissed for want of prosecution because they failed to prosecute the same within the confines of the rules. The appeal at the Supreme Court was dismissed because of their failure to pay for the costs for the record. In *casu* there is no reasonable explanation why this application was not brought immediately after the need to act arose. They have an excuse at every turn of their case. That is not how diligent litigants conduct their cases.

For these reasons I found no urgency in the matter and struck the matter off the roll of urgent matters with costs.

Jarvis.Palframan, applicants' legal practitioners
Mbidzo Muchadehama & Makoni, respondents' legal practitioners