BLEAT ENTERPRISES PVT LTD

Versus

B.W.B CHIKURA
And

THE OFFICER COMMANDING
ZIMBABWE REPUBLIC POLICE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 19 MAY AND 3 JUNE 2021

Urgent Chamber Application

J Tshuma, for the applicant
N Mashayamombe, for the 1st respondent
P Kunaka, for the 2nd respondent

KABASA J: This is an urgent chamber application in which the applicant seeks the following relief: -

> "1. The 1st respondents (sic) and all persons claiming through and under him shall remove, or cause the removal of themselves and all such persons occupying certain piece of land being subdivision 12 of Lot 15 of Nuanetsi Ranch A in Mwenezi District of Masvingo within 24 hours of the service of this order.
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> 2. Failing such removal, the Sheriff of this Honourable Court be and is hereby authorized and directed to evict the 1st respondent and all persons claiming through and under him from subdivision 12 of Lot 15 of Nuanetsi Ranch A in Mwenezi District of Masvingo.
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> 3. The 2nd respondent be and is hereby directed to provide an escort and any other physical assistance necessary for the Sheriff, during the service and execution of this order.
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> 4. The 1st respondent and all persons claiming through and under him are interdicted and barred from continuing to allocate or apportion or resettle any portion of subdivision 12 of Lot 15 Nuanetsi Ranch A in Mwenezi District of Masvingo.
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> 5. The 1st respondents (sic) shall pay the costs of this application on the legal practitioner and client scale.

The application was placed before me on the 12th May 2021 and I ordered that it be served on the respondents together with a notice of set down for 14th May 2021. On 14th May

2021 counsel for the 1st respondent requested for a postponement to enable the 1st respondent to file opposing papers. The postponement was granted and the matter was subsequently argued on 19th May 2021.

I propose to give the background facts which necessitated the filing of this application. The applicant is said to be the owner of a piece of land in Nuanetsi Ranch A Mwenezi , Masvingo. The exact description of the land was given as subdivision 12 of REM Lot 15, measuring 61,327 hectares. In July 2017 the 1st respondent is said to have gone to this farm claiming ownership by virtue of an offer letter issued on 17th July 2017. It later turned out that the land had not yet been gazetted for acquisition and the 1st respondent could therefore not be legally offered the land.

The land was subsequently gazetted in the Government Gazette of 29 September 2017. The 1st respondent was offered a Plot thereon and in November 2017 he went back to the farm and left some of his property. In 2018 he again tried to gain access to the property/land so as to leave farming implements but was denied access. In 2019, on two separate occasions, on the force of an offer letter issued on 17 April 2019 the 1st respondent tried to gain access to the land but without success.

In May 2020 the 1st respondent cut the lock to the gate and left his property within the premises. He was unable to gain access into the main house. In September 2020 one Ann Bradfield, a director of the applicant instituted proceedings in the Masvingo High Court, under case number HM 239/20 seeking a determination of the ownership of the farm. The matter is yet to be determined.

The applicant claims ownership of subdivision 12 of Lot 15 whilst 1st respondent was offered subdivision 12 of Lot 16 but has occupied subdivision 12 of Lot 15 instead.

In January 2021 the 1st respondent took occupation of subdivision 12 of Lot 15 and with it the control of 13 hectares of sugar cane crop which applicant claims to have farmed. In February 2021 the 1st respondent broke into the farm house and two of his relatives are now staying therein.

The applicant is unable to continue tending to the sugar cane crop and risks incurring losses as the yield is dependent on how such crop is nurtured.

Consequently, the applicant seeks the eviction of the 1st respondent.

The application is opposed. The basis of the opposition is grounded on the fact that the 1st respondent is occupying subdivision 1 of Lot 12 of Lot 16 and not the property described by the applicant.

The 1st respondent however raised points *in limine* which he argued must dispose of the matter without going into the merits.

I allowed the parties to address me on the points *in limine* on the understanding that should I uphold the preliminary points the matter will end there but in the event that these preliminary points find no favour with the court, I would then proceed to determine the matter on the merits based on the papers. The parties were agreeable to this.

I turn therefore to consider the points *in limine*. The first point *in limine* touched on the applicant's *locus standi* or lack thereof. The contention being that the land in question is not in the applicant's name and in an earlier urgent chamber application Anne Bradfield, a natural person was the applicant. There is therefore no basis for a juristic person to now claim the same land and to bring proceedings which are to all intents and purposes similar to those under HM 239/20 where a natural person assumed the legal right to bring such proceedings.

When the matter was argued before me, *Mr Tshuma* submitted that he had since shown counsel for the 1st respondent an Agreement of Sale which shows the applicant as the purchaser and not Anne Bradfield. Anne Bradfield therefore had no *locus standi* to bring the application in HM 239/20 as she could only do so as the applicant's representative.

Mr Tshuma also produced what purports to be a Notarial Deed of Servitude showing Anne Bradfield as acting on behalf of applicant. I will not dwell much on this document which was only initiated on every page but appears incomplete as every other detail as regards dates of when the parties appeared before the Notary Public, when the Notarial Deed was executed and signed, including the parties' signatures were not endorsed. The Notary Public's signature is also not appended. The document is therefore legally not what it purports to be. But for the fact that counsel for the 1st respondent appeared to acknowledge having seen the Agreement of Sale, I would not have placed any reliance on this Notarial Deed of Servitude as proof that the applicant has the legal right to bring these proceedings.

This point *in limine* was subsequently settled on the basis of counsel for the 1st respondent's decision not to persist with it. It therefore was abandoned and consequently fell away.

The second point *in limine* is on urgency. Counsel for the 1st respondent contended that the certificate of urgency is fatally defective for failure to meet the requirements of Order 32 rule 244. It does not give reasons for the urgency.

There is merit in this submission. I say so because the certificate of urgency does not really say much except alluding to the fact that sugar cane requires adherence to a strict management program to ensure a successful yield.

In *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188, CHATIKOBO J had this to say: -

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait, urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. If there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action." (my emphasis)

The certificate of urgency *in casu* is at most perfunctory given its purpose as per rule 244. I will reproduce it to illustrate this point: -

> "In July 2017, the 1st respondent was granted an offer letter in respect of ungazetted land and began claiming ownership of the applicant's farm. That offer letter was a nullity as the land in question had not been gazetted at the date of the offer letter. Subsequently, the 1st respondent was given another offer letter relating to a different property being subdivision 1 of Lot 12 of Lot 16 of Nuanetsi Ranch A. Despite being offered a different piece of land, the 1st respondent persisted in claiming ownership of the applicant's farm. Instead, the 1st respondent, in 2021 unlawfully and forcefully took occupation of the farm by breaking locks and refusing to leave occupation."

If this threat arose as far back as 2017 and the 1st respondent clearly showed determination to occupy that land, why is there no explanation as to why the applicant did not deem it fit to take action at the time the threat was imminent?

The legal practitioner goes on to merely refer to "in 2021" as the time of forced occupation. This is a certificate that was issued in May 2021 and yet the most that it says is "in 2021." May is the 5th month of the year and 5 months is a long time for one who regards their matter as urgent to fail to take action with haste.

One gets the impression that the legal practitioner was just going through the motions and not applying his or her mind to what the certificate of urgency was meant to achieve. It might as well not have been filed for all the good it did or failed to do.

Turning to the founding affidavit, it gives a chronological explanation of events whose genesis is in 2017 when the 1st respondent is said to have arrived at the farm claiming ownership. In November of the same year the 1st respondent followed up on that claim by leaving his property at the farm workshop. He was unrelenting, as in 2018 he was back again, now with farming implements, clearly demonstrating his intention to start farming on this land. In 2019 on two occasions he again showed his determination to access the farm. In May 2020 he took the matter a gear up by cutting the lock to the gate and leaving more property therein.

This action justified taking urgent steps to protect the right that was under siege. It was only in September 2020 that proceedings were instituted at Masvingo High Court, under case number HM 239/20 and even then, such action was meant to determine ownership and not to arrest this threat which was no longer imminent but had commenced.

That application was deemed not urgent and as *Mr Tshuma* conceded, correctly so, as the issue of ownership of the farm had long reared its head as far back as 2017 and so there was no urgency.

It was *Mr Tshuma*'s argument that the Masvingo matter relates to ownership and has no bearing to the matter at hand. What is important to understand here is the fact that the facts are the same. As *Mr Mashayamombe* correctly pointed out it is the relief that was being sought in HM 239/20 which has now changed. In this application what is sought is eviction but based on the very same facts.

The question therefore is, when the 1st respondent made those forays into the applicant's land, as far back as 2017, 2018, 2019 and 2020, was the effect not despoiling the applicant and therefore warranting the spoliation the applicant now seeks on an urgent basis? I would say it was and the applicant ought to have taken action then. The need to act arose at the time 1st respondent forced entry into the premises.

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

> "I understand CHATIKOBO J in the above remarks to be saying that 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."

The cause of action giving rise to the need to act arose as far back as 2017. Even if we are to say the threat in 2017 was not such as to cause panic but in 2018 and 2019 that threat escalated. That farm still had the sugar cane crop as the crop of choice and that sugar cane still required the care that the applicant refers to *in casu*. Why not act then? Why wait until May 2021.

And if we look at the issue focusing on January and February 2021, that still begs the question of why wait until May 2021 to bring an urgent application? More so since the sugar cane applicant seeks to protect was already under threat of interference to the financial detriment of the applicant.

> "In my view, 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." (*Document Support Centre* v *Mapuvire* (supra).

In casu the applicant cannot possibly dismissively say do not bother to act subsequently if you fail to do so now because it did not act when it ought to have.

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat."
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> The applicant did not exhibit urgency and can therefore not be heard to complain.

Mr Tshuma argued that the test for urgency is: -

a) Whether applicant will have substantial redress if matter is not treated urgently.
b) Has applicant created own urgency deliberately or negligently.
c) The circumstances and facts of the matter must be considered. If the delay was due to applicant trying to resolve the matter amicably the court cannot deny applicant an urgent hearing.

I must say each case must be looked at in light of its own particular circumstances. The factors enumerated by *Mr Tshuma* cannot be looked at in isolation. They must be applied to the facts of the case. A litigant who fails to act timeously cannot argue that I will not have substantial redress if you do not treat my matter with urgency. Urgency begets urgency. Why would the court drop everything to hear your matter and allow you to jump the queue if you did not exhibit urgency from the outset?

The facts *in casu* can be distinguished from those in *Nelson Mandela Metropolitan Municipality and 4 Others* v *Greyvenouw CC and 3 Others* 2003 JOL 10796 in that the applicant therein undertook to resolve the problem and engaged the respondents before seeking the court's intervention. The dispute was deemed to have arisen on 7th November 2002 and meetings and engagements followed culminating in the launch of the urgent application on 19th December 2002. The circumstances therein cannot be equated to the circumstances *in casu*.

The applicant *in casu* appears to have decided to go "spoliation" after the application in HM 239/20 failed to provide the relief the applicant was hoping for. There is nothing materially different regarding the cause of action which informed the bringing of proceedings under HM 239/20 and the cause of action which informed the launching of this urgent application.

Whilst *Mr Tshuma* is correct in arguing that urgency ought not to zero in on just a calculation of days, the very fact that the time when the need to act arose is an important consideration speaks to the issue of time. The time within which action is taken to redress the threatened harm speaks to how urgently the applicant treated the matter.

The submission that "Covid 19" restrictions had a bearing on the delay in taking action does not hold water. Courts were not functioning at full throttle but urgent applications were some of the matters that were exempted from the "ban on court sessions."

I have already alluded to the fact that the Masvingo HM 239/20 could easily have been the subject of an urgent application for a spoliation order. That application was launched and heard and so the issue of "Covid 19" restrictions is neither here nor there.

Mr Tshuma also argued that the applicant has a right to be heard and if the court does not hear it, it will be tantamount to a denial of the right to be heard. Nothing could be further from the truth.

The applicant was heard and preliminary issues were raised in that hearing. By denying the applicant an urgent hearing the court is not denying it the right to be heard.

As GOWORAJ (as she then was) put it in *Triple C Pigs and Another v Commissioner-General* 2007(1) 27.

> "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. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing the matter to be treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would render *brutum fulmen*.
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> I would however, in closing wish to quote respectfully the remarks of GILLISPIE J in *General Transport & Engineering (Pvt) Ltd &Ors v Zimbank* 1998 (2) ZLR 301 (H) at 302. Quoting from his own remarks in *Dilwin Investments (Pvt) Ltd v Jopa Enterprise Co Ltd* HH 116-98, the learned judge stated that:
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> > "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."

Has the applicant made a case justifying a departure from the first come first serve principle which courts ordinarily operate by and therefore shown good cause for treating it differently from other litigants? Has it shown urgency in the manner it treated its case to justify seeking preferential treatment?

I do not see the irreparable prejudice as the right of the applicant to recover whatever losses may be incurred in a reduced yield cannot be said will be irretrievably lost. The applicant has also not treated the matter with urgency as I regard this application as tantamount to be seeking a second bite of the cherry after the Masvingo urgent chamber application was removed from the roll for lack of urgency.

The applicant will be heard but not ahead of others before it. The applicant will have to wait its turn and respect the first come first serve principle.

> "It is my further view that the issue of urgency is not tested subjectively. Most litigants would like to see their disputes resolved as soon as they approach the courts." (per MAKARAU JP in *Document Support Centre (Private) Ltd* v *Mapuvire* (supra)

It is my considered view that the applicant has not made a case justifying jumping the queue. The applicant must therefore await its turn.

The 1st respondent has asked for punitive costs. I am not persuaded that a case has been made for an award of punitive costs. I do not hold that applicant's conduct deserves censure.

In the result I make the following order: -

1. The point *in limine* on urgency be and is hereby upheld.
2. The application is not urgent and is accordingly removed from the roll of urgent matters.
3. The applicant shall pay the costs of this application at the ordinary scale.

Messrs Webb, Low & Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Mutumbwa, Mugabe & Partners c/o Mashayamombe & Company Attorneys At Law, 1st respondent's legal practitioners