PRIONSIAS MICHAEL O'GORMAIN
versus
FORESTRY COMMISSION
and
THE MINISTER OF ENVIRONMENT AND TOURISM
and
THE PROVINCIAL MAGISTRATE (MR GUVAMOMBE)
and
THE ATTORNEY-GENERAL N.O.

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 11 and 12 October 2006

Urgent Chamber Application

D Drury, for the applicant
C F Dube, for the first respondent
Miss *L Mwatse*, for the 2nd, 3rd and 4th respondents

GOWORA J: The applicant is a national of Ireland. He came into this country as a visitor, what is commonly known as a tourist. On 31st August 2006, officers from the first respondent seized certain items which he had in his possession and which he intended to export to Ireland through a freight forwarding entity known as Trax International. It is common cause that at the time of seizure of these items, which are carved out wood, no documents were issued to the applicant. It is common cause that from that date the applicant and the first respondent have had discourse on several occasions concerning the seizure and the applicant's requirement that the seized items be released to him. The discourse did not yield any results. On 3 October 2006, subsequent to the entry into the fray of legal practitioners acting on behalf of the applicant, an order was issued by the third respondent granting the first respondent the right to retain in its custody the items seized from the applicant. A letter form the third respondent upon due enquiry from the legal practitioners advised that the order had been made in terms of s 86(3) of the Forest Act [*Chapter 19:05*] in conjunction with the provisions of the Communal Lands Forestry

Act. The applicant has now approached this court on a certificate of urgency for relief as follows:

IT IS ORDERED THAT:

1. That it be and is hereby declared that the seizure of Applicant's wooden carvings is unlawful and that the Order as issued for their continued retention dated 3rd October 2006, is unlawful.
2. That the Forestry Commission forthwith upon the grant of this order release the wooden carvings to Applicant or Applicant's representative.
3. That the 1st to 3rd respondents jointly and severally the one paying the other to be absolved pay the costs of this suit on a legal practitioner client scale.

Mr *Dube* on behalf of the first respondent has raised four points in *limine*. It is necessary that I dispose of the points in *limine* before I can then consider the merits in the event that I find for the applicant. The first objection raised on behalf of the first respondent is that the applicant, being a foreign national who is not ordinarily resident within the jurisdiction of this court, is enjoined by law to provide the first respondent with security for the payment by him of costs. The amount suggested by counsel for the first respondent is $650 000.00. Mr *Drury* on behalf of the applicant countered that the applicant had an obligation in terms of the law to provide security for the due payment by him of costs of suit but that the amount suggested by respondent's counsel was excessive as it appeared to be in respect of about 20 hours of work for legal practitioners in the category of both counsel going by the tariff of the Law Society. He made no counter offer. In response, Mr *Dube* maintained that the amount was reasonable taking into account his experience and the fact that according to the tariff his hourly rate averaged $40 000.00. He further

maintained that it was conceivable that taking into account preparatory work and matters incidental to the urgent chamber application.

It is trite that under our law any person who is a foreigner or who is not ordinarily resident within this jurisdiction may, as plaintiff, be called upon to provide security for costs unless he can prove that he has immovable property sufficient to pay the costs which may arise. In *casu,* the applicant has not denied that he has an obligation to provide the security for such costs. He has not indicated what amount would constitute a reasonable sum. The court has a discretion to dispense with the provision by a peregrinus to provide security for costs but only in exceptional cases. I did not hear Mr *Drury* to say that this court should exercise that discretion in favour of his client. In the circumstances, it is my view that in order for the applicant to pursue the suit against the first respondent, costs should be provided for. As the parties are not in agreement regarding the amount of such security costs, the parties should approach the Registrar who would be requested to set an amount. The application however cannot proceed pending the payment by the applicant of the costs.

The first respondent further contends in *limine* that the application, although brought by way of an urgent chamber application, is in itself not an urgent application that would warrant the matter being heard outside the normal times provided for by the Rules of this Honourable Court.

> "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."[1]

In my view, an applicant needs to establish, in approaching the court on a certificate of urgency, that irreparable harm will ensue if the matter is not heard urgently. A case must be made out by the applicant

[1] Per GILLESPIE J in Dilwin Investments P/L t/a Formstaff v Jopa Eng Co P/L HH 116/98

that the relief being sought cannot wait and that if not granted immediately will be for ever lost and unavailable to the applicant. The nature of relief sought must not such that it can wait but that the applicant wishes to be heard outside normal times because it would cause inconvenience to him if he is not heard urgently. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time to act arises, the matter cannot wait. See *Kuvarega v Registrar-General & Anor*[2].

The applicant herein fell foul of the first respondent's officers on 31st August 2006. I accept the averments in his founding affidavit that he and the first respondent were engaged in discourse in order to achieve a resolution to the dispute. I accept further that the applicant has had to postpone his departure on two occasions because of the lack of progress on the same. I do not accept the contention proffered on his behalf that the trigger that brought him to court was the order of retention issued by the third respondent in favour of the first respondent. The items which are the subject matter of this application were seized on 31st August 2006 and in so far as the applicant is concerned the order by Guvamombe merely put a legalistic coating on the detention of the goods. I believe that the true reason for bringing the matter to court as an urgent chamber application is due to the fact that the time for the applicant to return home is nigh upon him and he cannot delay this further. Granted, his departure without the matter being resolved will cause him inconvenience in that he may have to communicate with his legal practitioners at arms length, but that does not in my view constitute a situation that must cause this court to give him preferential treatment. There is no averment that he is likely to suffer prejudice if his matter is not dealt with urgently. The items in question are in the custody of the first respondent and in the event that he succeeds in having the same released, his legal practitioners are well placed to have them conveyed to him through the services of freight forwarders. The fact that he had not,

[2] 1998 (1) ZLR 188 (H) at p 193F.

at the time of seizure of the goods, placed in the possession of freight agents is not material as that can be done on his behalf if the need arises. I find that the applicant has not satisfied this court as to the urgency of the matter.

Two more objections were raised by Mr *Dube,* the one being that the Minister and the Attorney-General ought not to have been cited in these proceedings. Miss *Mwatse* who appeared for the two did not address me on the issue. I feel reluctant to determine the objection in the absence of full argument from counsel as to the propriety of such citation and also in the absence of any submission by the Attorney-General himself. For the resolution of this matter it is not necessary that I determine the objection. I will therefore reserve determination on this issue.

The last objection was that the applicant filed what appeared to be an application for review of the third respondent's order and yet had not complied with the requirements of Order 33 of our rules of court. The applicant does not accept that what is before me is a review which has not been properly brought. It is my view that for me to delve into the nature of the application would involve determining the merits of the application and in view of the finding by me that the matter is not urgent it is necessary for me to decide this issue. This question, like the last is reserved.

The application is therefore not properly before me. It is not urgent. Applicant is required to pay security for costs before the matter can proceed.

For the above reasons the application is dismissed with costs.

Gollop & Blank, applicant's legal practitioners
Dube, Manikai & Hwacha, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd & 4th respondent's legal practitioners