DOCUMENT SUPPORT CENTRE (PRIVATE) LTD
versus
T. F. MAPUVIRE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 26 and 31 October 2006

URGENT CHAMBER APPLICATION

Mr *D Chidziva* for the applicant
Mr *T K Hove* for the respondent

MAKARAU JP: The applicant approached a judge in chambers on a certificate of urgency on 5 October 2006, seeking an order calling upon the respondent to show cause why it should not be declared that the lease agreement between the applicant and the Respondent exists and is binding between the parties and that the respondent is in breach of the agreement. As interim relief, the applicant sought an order compelling the Respondent and all those claiming occupation through him of stand no 44 Tredgold Drive Belvedere, Harare to give vacant possession of the stand to the applicant upon service of the order.

Upon considering the matter, the judge formed the opinion that the matter was not urgent and made an endorsement to that effect on the application. The applicant, as it is perfectly entitled to do, sought audience with the judge to argue on the urgency of the matter. By the time the applicant's request was received, certain other developments had taken place that made it impossible for the judge to deal with the matter. It is in these circumstances that the matter was placed before me 21 days after the date of the filing of the application.

The facts forming the background to this application may briefly be summarized as follows.

The applicant approached the respondent sometime in August 2006 and showed interest in leasing the property in dispute with effect from the end of that month when the current lease was due to lapse by

effluxion of time. The applicant alleges that the parties negotiated. The respondent disputes this. A payment for rent was made by the applicant to the respondent on 30 August 2006 by a direct deposit into the respondent's account.

The applicant did not take occupation of the property on 1 September 2006. When it attempted to do so on 15 September 2006, it found the property under renovations. In anticipation of taking occupation on 1 October 2006, the applicant gave notice to its landlord that it was terminating its lease with effect from the end of September 2006.When the applicant sought to take occupation of the property on 1 October 2006, it found the premises occupied. It then brought the above application on a certificate of urgency, pleading that it had nowhere to trade from, having terminated its lease.

At the hearing of the matter, the issue of urgency loomed large. It was contended on behalf of the respondent that, having failed to take occupation of the property on 1 October, 2006, the matter was no longer urgent when, 25 days later, it was argued before me.

I was not persuaded by this argument. It is common cause that the applicant filed its application five days after it failed to take occupation of the premises as anticipated. That a period in excess of 20 days elapsed before the application could be heard is hardly the fault of the applicant. The delay in setting the matter down for hearing is a delay clearly attributable to the system. On that basis, I overlooked it.

Notwithstanding my opinion that the applicant did not delay in having the matter set down for hearing, the question whether the application as a whole is urgent remained alive.

In support of his argument that the matter is urgent, Mr *Chidziva* for the applicant referred me to the case of *Kuvarega v Registrar – General & Anor* 1998 (1) ZLR 188 (H) where in very instructive orbiter, CHATIKOBO J, at page 193F, defined what constitutes urgency for the purposes of the rules in the following terms:

> "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."(The emphasis is mine).

In coming up with this formulation, CHATIKOBO J was faced with an applicant who had delayed in approaching the court for relief until the 11th hour. In my view, while the orbiter by CHATIKOBO J may have been prompted by the late approach to court by the applicant before him, they are of general application in all urgent applications brought in terms of the rules.

Without in any way derogating from the impact of the dicta by the learned judge, I hereunder attempt to give my understanding of his remarks and how the remarks would apply to the facts of this application.

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.

I need to digress a little at this stage and observe that it further appears to me that it is not every legal interest that is capable of protection by way of an urgent application no matter how compelling the circumstances. Thus, while the general position is that when the need to act arises, an applicant may approach the court for immediate redress without delay, it is not on every cause of action that such an approach may be made. An example that comes to mind is a spouse who may find their spouse committing an act that renders the continuance of married life insupportable and would want to end the marriage there and then. While the circumstances may be compelling,

the aggrieved spouse may not approach the court for a decree of divorce on a certificate of urgency. The same observation can be made for most cases of damages for defamation, personal injury and /or accident damages to property.

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

Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts acting swiftly where such interests are concerned is in my view clear. Failure to act in these circumstances will result in the loss of life or the liberty of individuals or the infliction of irreversible physical or psychological harm on children.

It is now accepted that in some cases, even purely commercial interests can be protected urgently in appropriate cases. In *Silvers' trucks (Pvt) Ltd and Anor v Director of Customs & Excise* 1999 (1) ZLR 490 (H) SMITH J considered the matter of the release of certain attached imports on the basis that the applicant would face bankruptcy and its 67 employees would lose their jobs as a result. In my view, the reasoning adopted by SMITH J in this regard is still in line with the objective test that had the court waited, there would have been no need for the court to act subsequently. The applicants would have been liquidated and the return to it of the attached imports would not have reversed the effect of non-timeous action by the court. It will be of no further benefit to the applicant to pursue the legal interest.

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.

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. The test to be employed appears to me to be an objective one where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned.

If I am correct in my understanding of what CHATIKOBO J meant in the *Kuvarega* case, then the application before me is not urgent. It presents itself clearly to me that if the application is not determined now, the applicant does not irretrievably lose its right to hold the respondent to the lease agreement.

The applicant may well argue that if the matter is not dealt with urgently, it will lose the right to occupy the property. However, that right is not irretrievably lost.

In the main, the applicant seeks to have the alleged contract of lease upheld. That right has not been lost. It remains open to the applicant and remains even if the matter is not dealt with urgently.

In my view, the interest lost by the applicant in this matter is purely one of convenience as it may have been forced to look for other accommodation and possibly a financial interest in lost revenue. If a financial interest has been lost or compromised, it is my further view that such interest is not a financially crippling interest as faced SMITH J in the *Silvers Trucks* case. It is no more than the financial interest that every lender suffers when a debt is not paid on time or when a supplier fails to deliver in time, where time is of the essence.

On this basis, I would dismiss the application with costs.

Assuming that I have erred in my formulation of what constitutes urgency under the rules, I still would have dismissed the application on two other bases.

Firstly, it is common cause that some family is now in occupation of the property. The family or its head was not cited in the application. As it is common cause that the respondent is not in occupation of the property, any reference to the eviction of the respondent and all those claiming through him is clearly in reference to the family in occupation.

Thus, this application is an attempt to evict the occupants of the property without affording them a chance to be heard and the applicant is clearly non-suited on this basis.

Secondly, the applicant is not seeking interim protection. It is seeking an order giving it occupation of the property in terms of the lease. In my view, giving the applicant vacant possession of the property is actually the final order that the applicant is seeking. If the property had not been leased out to a third party and the applicant had sought an order restraining the respondent from leasing out the property pending determination of the validity of the lease between them, I may have been persuaded to protect the applicant's legal interest in that respect.

In the result, I make the following order:

1. The application is dismissed.

2. The applicant is to pay the respondent's cost of suit.

Kantor & Immerman, applicant's legal practitioners.
T K Hove and Partners, respondent's legal practitioners.