

ARTHUR CHIKUKWA  
versus  
ROBERT MHLANGA  
and  
SALIM SULEMAN DESAI  
and  
MINISTER OF MINES & MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 28 August 2020

### **Urgent Chamber Application**

Applicant in person  
*T Magwaliba.*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondents

MUZOFA J: I heard this urgent chamber application on 12 August 2020. I concluded that the matter is not urgent and accordingly struck it off the roll of urgent matters. The applicant has requested for the written reasons for my decision which I set out herein.

The applicant sought the following relief as set out in the draft provisional order.

#### **“TERMS OF FINAL ORDER SOUGHT**

That you show cause to this honourable court why a final order should not be made in the following terms:

1. 1<sup>st</sup> & 2<sup>nd</sup> respondent give vacant possession and occupation of 30 Guy’s Cliff Greystone Park, Harare to applicant.
2. 3<sup>rd</sup> respondent restore ownership of special grant 5341 Masvingo District and all status *quo* conditions.
3. Cost of suit.

#### **INTERIM RELIEF GRANTED**

Pending determination of this matter, the applicant is granted the following relief:

1. 1<sup>st</sup> & 2<sup>nd</sup> respondents be interdicted from disposing of 30 Guy’s Cliff, Greystone Park, Harare and in the interim give vacant possession to the applicant.
2. 3<sup>rd</sup> respondent be interdicted from giving or awarding the special grant to any other part (sic) other than the applicant. The applicant to be given all rights and access to the claim.
3. Cost of suit.

#### **SERVICE OF THE PROVISIONAL ORDER**

Deputy Sheriff or his lawful deputy to serve

At the hearing Mr Magwaliba for the 1<sup>st</sup> & 2<sup>nd</sup> respondents raised a point *in limine* on urgency. He submitted that the applicant claimed he lost possession of 30 Guy’s Cliff, Greystone Park, Harare (the property) after his conviction in 2016, he did not action to

recover it. The applicant noted and appeal to and was subsequently acquitted by the Supreme Court 24 October 2019. The applicant did not take action to recover the property. This application was filed on 3 August 2020 and no explanation was given for the non-action. The applicant failed to take action when the need to act arose. I was referred to the case authorities that succinctly define what urgency entails.<sup>1</sup>

In response the applicant, a self-actor insisted that the matter is urgent. He submitted that he was arrested and appeared before the High Court. He was convicted in 2016 and sentenced to imprisonment. He was ordered to surrender the property to first and second respondents. On 24 October 2019 the Supreme Court upheld the appeal he therefore believes the status *quo ante* should be restored.

In his oral submissions the applicant averred that he could not claim the property because he was in prison. After his release he could not immediately approach the court because he entertained serious doubts as to whether he will get justice from the courts based on his previous experiences in the courts. He says he was eventually assured by the Chief Justice in July that he can approach the courts. He then wrote a letter to the first and second respondents demanding the property. He did not get any response. It is only then that he then approached the court on an urgent basis.

In determining whether a matter is urgent, the court is guided by the nature of the threat, the cause of action and the conduct of the applicant at the time the need to act arose. A matter is urgent where the circumstances are such that if the court were not to intervene the applicant would suffer irreparable harm. I agree with the exposition of this perspective in *Document Support Centre (Pvt) Ltd (supra)* where the court commented on the sentiments in the *Kuvarega* case (*supra*)

“I understand CHATIKOBO J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving the 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.”

In other words the court’s intervention should be sought immediately when the threat arises or when a violation has occurred to avert the danger.

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<sup>1</sup> *Kuvarega v Registrar –General & Anor* 1998 (1) ZLR 188 ( H),*Document Support Centre Pvt (Ltd) v Mapuvire* HH 117/06

In the *Kuvarega* case (supra) the learned judge set out what constitutes urgency as follows,

“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.”

Two issues arise from that statement that are relevant in this case. The court has to identify when the need to act arose. At the time the need to act arose, the circumstances should be such that any delay in acting to avert the threat or harm would result in irreparable harm. Thus the Court would be invited to intervene to protect the legal interests of the party so threatened or harm has befallen. The applicant’s conduct in dealing with the matter is of uttermost importance, the applicant should also treat the matter as urgent. This can only be deciphered from the applicant’s conduct at the time the threat or harm manifest. Thus parties always refer to when the applicant took action to protect his or her rights.

I was not persuaded at all by the applicant’s narration of events that when the need to act arose he took action. In this case the applicant’s problems arose from the forfeiture of his alleged property and the special grant upon his conviction in October 2016. I do not agree with counsel for the first and second respondents’ submissions that the need to act arose in 2016. This is because the order for compensation granted by the court upon the applicant’s conviction was the basis of the loss of the applicant’s legal interests in the property. There is no way the applicant could have approached a court on an urgent basis challenging the court order. The challenge could only be by way of appeal which appeal was noted.

In my view the need to act arose in October 2019 when the Supreme Court set aside the applicant’s conviction. The applicant relies on the Supreme Court order as a basis of this application. He alludes to the fact that the continued retention by the first and second respondents of his property and the special grant has resulted in financial prejudice to him. The applicant did not act to protect his interests at the time. He cannot successfully convince the court in August 2020 that the matter has suddenly become urgent. There is no explanation in the founding affidavit why the applicant did not take action as far back as October 2019. That on its own is evidence that there is no urgency in the matter.

The applicant attempted to explain in his oral submissions why he could not approach the court. I understand the applicant’s predicament as an unrepresented litigant but the law applies to both represented and unrepresented litigants. An application stands or falls on the founding affidavit.

Even if I would overlook the requirement to confine this application to the founding affidavit and consider the oral submissions, the submissions do not assist the applicant. The applicant submitted that he believed he would not get justice from the courts, he needed to be assured that his interests would be protected. In my view, the applicant had literally put the cart before the horse. He should have approached the courts to protect his legal interests and not rely on what the courts might do or not do. The apprehension in my view was remote. Even if that could be taken as valid. The applicant says he was assured of the proper administration of justice in June 2020, still he did not act. He actually had the opportunity to write letters to first and second respondents surely the applicant was not faced with irreparable harm. It is clear from his submissions that what prompted the applicant to approach the court on an urgent basis are his financial partners who have demanded proof of ownership of the special grant.

Even if applicant may have a cause of action. The non-intervention by this court on an urgent basis will not result in irreparable harm. In other words can it be said this is a matter where if the court does not intervene the applicant would suffer irreparable harm or that if the court does not intervene now it might as well not intervene in the future because the harm has already been done? I do not think so, this is a matter that can very well join the queue and be dealt with on the ordinary roll.

In respect of costs the applicant did not oppose the granting of costs. I shall grant them as prayed for.

It is for the above reasons that the court made the following order:

“Matter is struck off the roll of urgent matters.”

*Messrs Desai & Associates*, 1<sup>st</sup> & 2<sup>nd</sup> respondents’ legal practitioners