GRACE MAENZANISE
versus
DENIAL MURAMBIWA CHIMUTI

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 2 & 3 November 2021

URGENT CHAMBER APPLICATION

A Masango, for the applicant
N F Kambarami, for the respondent

MANZUNZU J: The parties who were husband and wife were divorced through an order of this court on 21 May 2020 in case number HC 10986/17. The applicant was the plaintiff and respondent was the defendant. As part of the ancillary order, para 9 in part reads;

> " The plaintiff is hereby awarded a 75 per share in Stand 655 The Grange, Harare whilst the defendant is awarded a 25 per cent share thereof.
> i) …
> ii) The plaintiff is hereby granted the option to buy out the defendant's share within 6 months of receipt of the evaluation report or within such longer time as the parties may agree.
> iii) Should the plaintiff fail to exercise the above option the property shall be sold to best advantage by an estate agent mutually agreed by the parties. Failing such agreement one shall be appointed the Registrar from his list of independent estate agents.
> iv) The net proceeds of the sale shall be distributed in terms of the sharing ratio of 75 per cent for the plaintiff and 25 per cent for the defendant."

The applicant has filed this application on an urgent basis seeking the following order as amended at the hearing:

"TERMS OF THE FINAL ORDER SOUGHT
1. The extension of the period within which applicant was to buy out respondent twenty percent share in stand 655 the Grange HC 10986/17 be and is hereby confirmed.
2. Clause 9 ii of the court order in HC 10986/17 be and is hereby amended/varied to read as follows;
   2.1 Plaintiff be and is hereby given an option to buy out defendant within 6 (six) months from the date of this order.
3. Respondent pay costs of suit.

INTERIM RELIEF GRANTED
That pending the determination of this matter;
1. Should any process to sale the property by private treaty having been commenced in compliance with clause 9 (iii) of the order in HC 10986/17 such process be and is hereby suspended."

The applicant says the application is brought in terms of section 9 of the Matrimonial Causes Act, Chapter 5:13 which provides that; "Without prejudice to the Maintenance Act [*Chapter 5:09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section *seven*, and subsections (2), (3) and (4) of that section shall apply, *mutatis mutandis*, in respect of any such variation, suspension or rescission."

Applicant confirms she received the evaluation report on 29 April 2021. She had up to 29 October 2021 to exercise her option to buy out the respondent. She failed for one reason or the other. She then filed the present application a day before the expiration of the 6 months.

The application is opposed by the respondent who has raised points *in limine* which are subject of this ruling. Respondent alleges that the matter is not urgent, that the court is *functus officio* as s 9 of the Matrimonial Causes Act was restricted to the issues of maintenance and that the provisional order was defective in so far as it sought a final order. I will now turn to the preliminary points.

URGENCY

The requirements of urgency are settled. In *Kuvarega* v *Registrar-general & Anor* 1998 (1) ZLR 188 (HC) it was stated "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. 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."

In *Boniface Denenga & Anor* v *Ecobank Zimbabwe (Pvt) Ltd & 2 Others* HH 177-14 MAWADZE J identified a common thread in the cases which dealt with the issue of urgency. At p 4 of the cyclostyled judgment he stated that;

> "The general thread which runs through all these cases is that a matter is urgent if,
> "(a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
> (b) There is no other alternative remedy.
> (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or a sufficient reason for such a delay.
> (d) The relief sought should be of an interim nature and proper at law."

In casu applicant only acted a day before the deadline. Mr Masango who appeared for the applicant argued that the matter was urgent and that the applicant treated the matter as urgent. When she realized she could not meet the deadline, applicant wrote a letter to the presiding judge asking for an extension. This was on 14 October 2021 before she was advised by the Registrar of the proper course to take. Mr Kambarami for the respondent argued that the need to act arose when applicant realised she could not beat the deadline. That was in August 2021as per her averments.

> It is instructive to refer to what the applicant said in her affidavit. In paragraph 17 of her founding affidavit she said; "During the period of lockdown June to August 2021, I could not generate the much needed funds and it affected my projections to secure US$75 000.00 which is the twenty-five (25) percent share of the property due to respondent which is a substantial amount of money."

It is clear the applicant could see the possibility of her failure to raise the required amount as far back as August 2021. She did nothing except to write a letter on 14 October 2021 asking for an extension. She waited at her own peril for the day of reckoning. She did not act at the time when the need to act arose. In *Gwarada* v *Johnson & Ors*, HH 91/09 it was stated,

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be." (emphasis is mine).

An applicant has a duty to lay out in his/her founding affidavit why he/she says the matter is urgent. In *Mayor Logistics (Private) Limited* v *Zimbabwe Revenue Authority CCZ* 7/14 the court had this to say; "A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike."(my emphasis).

In casu the application does not meet the requirements for urgency. If anything the urgency is self created. In any event nothing was shown that an effort was made to engage the other party seeking an extension by consent as provided for in the order of the court. The matter having failed the test for urgency, there is no need to deal with the other preliminary points.

Disposition

1. The matter is not urgent.
2. The application is struck off the roll with costs.

Muronda Malinga Legal Practice, applicant's legal practitioners
L T Muringani Law Practice, respondent's legal practitioners