SONDELA RANCHING (PVT) LTD

Versus

THE SHERIFF OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 & 5 May 2023 & 18 May 2023

Urgent chamber application

P. Madzivire, for the applicant
L. Mpofu, for the respondent

DUBE-BANDA J:

[1] This is an urgent application. The applicant seeks a provisional order couched in the following terms:

Terms of the final order sought

That you show cause to this Honorable Court why a final order should not be made on the following terms: -

i. That 1st respondent levies applicant in terms of the Tariff of Sheriff's Fees and Charges.
ii. That the fee should be in terms of section 6(1)(a) of SI 195 of 2022 as read with section 6(1)(b)(ii) of the Statutory Instrument.
iii. Costs on a punitive scale against respondent jointly and severally.

Interim relief granted

Pending the return day, applicant is hereby granted the following relief: -

i. That the 1st respondent or anyone acting under his stead or under his instruction be and is hereby ordered to act within the confines of the Tariff being SI 195 of 2022.
ii. Costs on a punitive scale against the respondents.

[2] The application is opposed by the second respondent. The first respondent (Sheriff) merely filed a Report. I take the view that the Sheriff has made a decision to abide by the decision of the court.

[3] The factual background of this matter can be summarized as follows: a company called Canelox Investments (Pvt) Ltd (Canelox) instituted legal proceedings against the applicant for the recovery of a certain amount of money. Canelox obtained a court order and sued out a writ of execution against the applicant. The second respondent (Auction House) is an auctioneer appointed by the Sheriff. The applicant's attached goods were placed in the custody of Auction House pending sale by public auction. The sale was schedule to be conducted on 21 April 2023.

[4] On 20 April 2023 Canelox's legal practitioners wrote a letter to the Sheriff informing him that the applicant has made a significant payment of the debt and authorizing a hold-over of the sale. The hold-over was on condition the applicant paid Canelox's legal costs and the Sheriff's costs. The applicant paid the Sheriff's costs. Thereafter by letter dated 20 April 2023 addressed to Canelox's legal practitioners the Sheriff advised that an amount of USD$5 015.00 was due and payable to Auction House for costs allegedly incurred by it from the date of removal to the date of the hold-over. The applicant queried the amount said to be due to the Auction House, which prompted the Sheriff to explain that the charges were *per* the Sheriff's Standard Approved Charges for the Auctioneers (SACA). The Sheriff explained further that the charges were approved by the Judicial Service Commission (JSC) and came to effect on 24 November 2021. The Sheriff noted that the charges were fair in that the removed property included a huge number of items in excess of 15 tonnes.

[5] The applicant is aggrieved by the charges levied by the Auction House and contends that they are in contravention of High Court (Fees and Allowances) (Amendment) Rules, 2022 (No. 26) (SI 195 of 2022) and therefore illegal and a nullity. It is against this background that applicant has launched this application seeking the relief mentioned above.

[6] Mr *Madzivire* Counsel for the applicant argued the merits of the matter, and contended that a case had been made meriting the granting of the provisional order sought. *Per contra* Mr *Mpofu* Counsel for the second respondent argued that this application was not urgent, and that on the merits the applicant has not made a case for the relief sought. The attack on the urgency of the matter needs to be considered *in limine*.

[7] In support for the point *in limine* Mr *Mpofu* argued that the certificate of urgency does not establish urgency as contemplated by the rules of court. It was argued further that the certificate does not specify the time-lines to show that the matter is indeed urgent. It was contended that the founding affidavit does not speak to urgency. Counsel argued further that this matter is not urgent and must be struck of the roll off urgent matters. *Per contra* Mr *Madzivire* argued that this application is urgent. Counsel said that the factual basis for the urgency is in the founding affidavit, and repeated the averments made in the certificate of urgency. Counsel argued further that there appears to be a corrupt relationship between the Sheriff and the Auction house, and that public policy frowns against such manifestation of corruption. Counsel urged the court to treat this matter with urgency in order to arrest this apparent manifestation of corruption.

[8] It is trite that the certificate of urgency is an assisting aid to the court and not a substitution to the discretion of the court. It plays a critical role and it must lay down the basis upon which the legal practitioner expresses his opinion of urgency. It assists the court in its determination of whether or not a matter is urgent. It must establish a factual basis and the trigger for the urgency. In *Chidawu & Ors v Sha & Ors* 2013 (1) ZLR 260 (S) the court said a certificate of urgency is the *sine qua nom* for the placing of an urgent chamber application before a judge. In making a decision as to the urgency of the chamber application the judge is guided by the statements in the certificate by the legal practitioner as to its urgency.

[9] In *casu* the question of urgency is addressed in seven paragraphs in Nkosiyabo Sibanda's certificate of urgency, *viz* in which he states as follows:

i. The respondents herein are in custody of applicants' moveable property as fully outlined and canvassed in the founding affidavit.
ii. The respondents herein are acting ultra vires the provisions of Statutory Instrument 195 of 2022, which is the Tariff of Sheriff's fees and Charges.
iii. The charges being levied are not in line with SI 195 of 2022.
iv. Applicant has (*sic*) prima facie right that its matter be dealt with in terms of SI 195 of 2022.
v. Applicant will suffer irreparable harm if the court not intervene, so that respondents adhere to SI 195 of 2022.
vi. Applicant has no other remedy at law, except to approach the court on urgent basis.
vii. It is therefore imperative that this Honourable court intervenes.

[10] In this case the certificate of urgency does not provide detailed factual basis for the urgency. It does not clearly provide the trigger for the urgency. The only factual point in the certificate is that the respondents are in custody of the applicant's movable property. The remaining six paragraphs deal with points of law, which have no direct bearing on the urgency of the application.

[11] In *Mushore v Mbanga & 2 Ors* HH 381/16 the court held that there are two paramount considerations in considering the issue of urgency, that of time and consequences. These are considered objectively. The court stated:

> "By 'time' was meant the need to act promptly where there has been an apprehension of harm. One cannot wait for the day of reckoning to arrive before one takes action… By 'consequences' was meant the effect of a failure to act promptly when harm is apprehended. It was also meant the effect of, or the consequences that would be suffered if a court declined to hear the matter on an urgent basis."

[12] In *casu* the certificate of urgency does not provide a time-line. It does not state when the need to act arose. Even the founding affidavit is conspicuously silent about this crucial aspect of the matter. This court cannot tell when the need to act arose, and whether or not the urgency alleged stems from a deliberate or careless abstention from action until the dead-line draw near because such is not the type of urgency anticipated by the rules of court. See: *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188. In *Gwarada v Johnson & Ors,* HH 91/09 it was stated thus:

> "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."

[13] An applicant has a duty to lay out in his founding affidavit why he says the matter is urgent. This is over and above what is expected of the certificate of urgency. 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. The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual."

[14] The founding affidavit is deficient when it comes to the reasons for urgency. The prejudice that the applicant says it will suffer is just convoluted and it does not come out with the required precision. There is nothing that shows that if this matter is not dealt with as a matter of urgency the applicant will suffer irreparable harm. The property that is in the custody of the respondents has been thereat for the past twenty-two (22) days, and nothing to show that any further delay in the release of the property will cause the applicant irreparable harm. There is no allegation that if the provisional order is not granted the applicant will incur further storage costs. There is nothing to show that this is the kind of case envisaged in *Documents Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H) where the court said urgent applications are those where if the courts fail to act, the applicant 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 to the prejudice of the applicant.

[15] It is trite that it is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue and have its matter given preference over other pending matters. This indulgence can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See: *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188; *Triple C Pigs and Another v Commissioner-General* 2007ZLR (1) 27. The applicant has failed to show a basis to be permitted to jump the queue and have this matter heard on an urgent basis.

[16] Every litigant who brings their cases before these courts wishes to have their matters 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. This is not always possible. See: *Triple C Pigs and Another v*

Commissioner-General 2007 ZLR (1) 27; *Condurago Investments (Pvt) Ltd v Mutual Finance (Pvt) Ltd* HH 630/15. For a litigant to successfully motivate a court to hear its matter on an urgent basis, it must show that its matter is out of the ordinary. There must be some fact triggering the urgency. In *casu* the certificate of urgency is defective, the factual basis of the alleged urgency is not mentioned, the time-line is not provided, the founding affidavit does not provide a basis for the urgency, and the alleged prejudice does not come out with the required precision. In the circumstances there is no reason why this matter should be heard in the urgent roll and not in the ordinary roll. There is no urgency in this case. This matter is not urgent and it cannot be afforded a hearing in the roll of urgent matters. It falls to be struck off from the roll of urgent matters.

[17] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the second respondent's costs.

In the result, I make the following order:

i. The point *in limine* that this matter is not urgent is upheld.
ii. The application is not urgent and is struck off the roll of urgent matters with costs of suit.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Mpofu,Malinga & Mpofu 2nd respondent's legal practitioners