HH 46/21
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JIM KUNAKA
versus
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
COMMISSIONER GENERAL OF THE ZIMBABWE PRISONS AND CORRECTIONAL SERVICES

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE,

Date of judgment: 9 February 2021

Urgent chamber application

MAFUSIRE J

[1] This is an application supposedly for a mandatory interdict. It is accompanied by a certificate of urgency in ostensible compliance with Order 32 r 241 of the High Court rules. I have had to determine the matter on the papers without hearing oral argument. The application is against a background of a spike in the spread of the deadly corona virus and a rise in fatalities from covid-19 related complications. On 2 January 2021, in response to that spike, the Government, as did many others around the world, ordered a return to a high level lockdown which is characterised by severe restrictions on the movement of people. In the Judiciary, a new Practice Direction from the office of the Chief Justice was issued to provide guidance on how the courts may carry out their functions during these difficult times. Among other things, urgent matters may be determined on the papers without the need for oral argument.

[2] The applicant is detained in custody at Harare Remand Prison in respect of certain criminal charges being preferred against him. In the draft order, he seeks interim relief pending the determination of the matter. But he does not state *what* that matter to be determined is,

when it will be determined or *where* it will be determined. The orders sought are multiple and, in some sense, repetitive. In summary, they are these:

- ✓ that within 10 days of the receipt of the order, the respondents should provide covid-19 testing kits for every staff member of the third respondent that may be required to report for duty at Harare Central Prison and at all the criminal courts in Harare for the duration of the lockdown, or any subsequent extensions thereto;

- ✓ that the third respondent should stop any of its staff members who may test positive for covid-19 from reporting for duty or interacting with inmates detained at Harare Remand Prison until such time that such staff members furnish covid-19 clearance certificates;

- ✓ that within 10 days of the receipt of the order, the respondents should provide covid-19 testing kits for every accused person that is remanded in custody at Harare Remand Prison;

- ✓ that prisoners testing positive for covid-19 should be kept in separate cells at the courts and at Harare Remand Prison from those testing negative;

- ✓ that prisoners testing positive for covid-19 should use separate transport to and from the courts from those testing negative;

- ✓ that the court before which a prisoner testing positive for covid-19 is set to appear should be advised, on the day and in writing, of the result of the test;

- ✓ that before being remanded into custody at Harare Remand Prison, all persons should be tested for covid-19;

- ✓ that before they are placed into communal transport, suspects and (prison) guards should have their temperature checked; be required to observe social distancing and be sanitized, and

- ✓ that the respondents should pay the costs of suit.

[3] The relief sought on the return day is said to be:

- ✓ confirmation of the provisional order;

- ✓ a declaration of unlawfulness in respect of any accused or convicted person if detained at Harare Remand Prison without due compliance with the Government's own covid-19 prevention and containment regulations, and

- ✓ costs of suit against the respondents

[4] An urgent chamber application typically comprises the founding document commencing action which should be in Form No 29 or 29B as circumstances may require. If the applicant is represented, the application must be accompanied by a certificate of urgency by a legal practitioner setting out the grounds of urgency such as to warrant preferential treatment of the application. There is then the founding affidavit and/or other affidavits of the evidence of the averments, together with the documents to support. Finally, there is the draft order which sets out the interim relief sought which is in the form of a provisional order, and then the final order being sought on the return day. Elaborate rules govern, among other things, the form and content of every integral component of an urgent chamber application. In addition, there is abundant case law which provides the necessary guidance.

[5] The present application is incurably defective from start to end. It is non-compliant in material respects. The founding document is defective. The certificate of urgency is defective. The founding affidavit is defective. So too is the draft order. All these documents, except perhaps the draft order, are in essence and in substance heads of argument in disguise. Below I show how.

i/ *Urgent chamber application*

[6] No rule of law or practice prescribes the length or the number of pages for this document. But from what is stated as to what the document should be or say, and from general observations and practice over the years, it would seem that something like three to five pages should be long enough. Rule 227(2)(a) that requires the pagination and indexing of a written application that is more than five pages long is referring to the entire application, i.e. from the founding document, the affidavits and the documents, up to the draft order, not just the notice of application. However, no rule of thumb can be laid down as to the length of this founding document. Every case depends on its own set of facts.

[7] In this matter, the applicant's founding document commencing the proceedings is a staggering fifteen paragraphs spanning over ten pages. But that is not the main problem. The main problem is the disregard of the direction in the Rules. In terms of the proviso to r 241(1), a chamber application to be served on an interested party is to be in Form No 29, with appropriate modifications. Form No 29 is the one used for ordinary court applications. It is just

a notification to the court and to the interested party of the application being made; what the interested party may do within the specified time frame, and what the consequences of non-action by the interested party may be. Form 29B is the one prescribed for chamber applications.

[8] There is a glut of cases explaining the difference between these two forms. The cases provide guidance on what the "appropriate modifications" envisaged in the proviso aforesaid may be, and on what the content of the founding document should be when the appropriate modifications have been effected. In a nutshell, the key directions of the two forms are integrated. But that is not my point in this judgment. I need not even dwell on it. My point in this judgment is that Form 29B directs the applicant to set out ***in summary*** the basis of the application. All what the applicant desires in this suit is to force the Executive arm of Government to comply with its own covid-19 prevention and containment regulations, with particular regard to persons detained at Harare Central Prison and the members of staff for the second and third respondents. That hardly requires three paragraphs. But what the applicant has done, in essence, is to plead all the facts of his case, present what he considers to be the evidence thereto, and submit heads of argument, all in one document. That is not setting out ***in summary*** the basis of the application. That is the material respect in which his founding document is defective. However, if it were the only defect, I would have condoned it *mero motu* and dealt with the substance of the application. After all, none of the respondents takes the point. Regrettably it is not the only defect afflicting the application. .

ii/ *Certificate of urgency and urgency*

[9] Hardly anything new or original can be said again on certificates of urgency as prescribed by r 242(2) beyond what this court and the Supreme Court have already said on the point. All that can be done is to summarise the substance of the judgments of the courts over the years. A properly executed certificate of urgency is the *sine qua non* for an urgent chamber application being heard on an urgent basis. A legal practitioner applies his or her mind to the matter as an officer of the court and certifies it as one of urgency. Even though the judge dealing with the matter will still decide whether or not the matter is urgent, he or she is entitled to rely on the opinion of the legal practitioner who certifies the matter to be urgent.

[10] Mr Obey Shava is an experienced litigation practitioner. The certificate of urgency in this matter has been furnished by him. But the document is anything but a certificate of urgency as contemplated by the Rules. It regurgitates the facts. It regurgitates the central argument. Hardly anything is said on why the matter should be treated as one of urgency and therefore, be allowed to jump the queue of all other equally important matters awaiting determination. For example, as early as Para 2, Mr Shava launches into argument. He says the respondents are government officials with a responsibility to uphold the law. They have the obligation to treat inmates lawfully, fairly and without discrimination. They are under domestic and international law to protect the applicant's fundamental human rights and to prevent him from any known danger. The respondents have neglected to take any measures or to devote any resources to prevent harm or protect inmates. The rest of the paragraph is in similar vein. So is the rest of the certificate.

[11] What may be said to be nearest to urgency are the allegations that the applicant is detained in overcrowded conditions where the respondents do not observe any of the measures put in place to protect all other citizens, such as the wearing of masks; sanitization; social distancing; temperature checks; and the like, thus exposing the applicant to the deadly corona virus. But this does not explain why this particular application should be treated as an emergency. It does not explain why it should be assumed that the need to act has just arisen. The applicant has been in detention since 24 December 2020. This application is being made a month later. The need to act timeously when the day of reckoning is imminent is an aspect of urgency that must be explained. Lockdown measures have been in place since March 2020.

[12] It is largely because of the defective certificate of urgency that I have declined to deal with this application on the merits. Furthermore, as I have adverted to briefly above, the aspect of urgency, which is integral to a matter being given preferential treatment ahead of all others, is not self-evident from the papers. It is largely assumed. It may be assumed that any person detained in prison in conditions where the measures designed to prevent or contain the spread of the deadly disease are non-existent call for urgent consideration because of the attendant risk to life. But apart from the fact that the averments are superficial and are, at any rate, vigorously refuted by the respondents in their opposing affidavits, the question as to when the need to act arose is not dealt with properly. There is just some off-handed excuse in the founding affidavit

that the applicant has limited access to his legal practitioner and the outside world and that he hoped to get bail in early January 2021 after which he intended to prosecute the application from the comfort of his home, in the public interest. So, what exactly is being said about urgency? Thus, I find that urgency in the sense contemplated by the Rules has not been established.

iii/ *Founding affidavit*

[13] With the finding that I have made regarding the certificate of urgency and the urgency itself, I need go no further to examine the rest of the application. But in brief, the founding affidavit heavily relies on hearsay evidence and mere conjecture. In a proper affidavit, the deponent must swear positively to the facts or the averments presented therein. But in this case, the applicant, from his extremely limited circumstances by reason of his incarceration, has purported to speak for everyone else, including, among others, prison officers; court officials; fellow inmates; health workers; former remand inmates, and so on. He speaks of the manner of travel or mode of transport for members of staff for the respondents; the general breach of the lockdown measures; the absence of relevant covid-19 testing equipment at certain institutions, and so on. The affidavit is just a hotchpotch. It lacks focus. Above all, it is largely argumentative.

iv/ *Draft order*

[14] In substance, and despite the term 'interim relief', the provisional order seeks final relief, complete with an order of costs. This is irregular. Among other things, final relief cannot be granted on mere *prima facie* proof, which is all that an application for an interim order is required to show.

[15] For these defects, the application cannot be considered on the merits. It is hereby removed from the roll of urgent matters. No order of costs has been sought against the applicant. Therefore, none shall be awarded.

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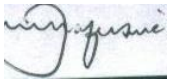

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