

KUALA INVESTMENTS (PRIVATE) LIMITED

And

COSMAS NTINI

And

JULLY-ANN NOMAWETHU NDLOVU

Versus

UMGUZA RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 21 JUNE AND 13 JULY 2023

Urgent Chamber Application

Mrs.J. Mugova, for the applicants
Mr.S. Chamunorwa, for the respondent

KABASA J: This is an urgent chamber application in which is sought the following relief:-

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. That the interim relief be and is hereby confirmed on the return date to the effect that:-
 - 1.1 Respondent be and is hereby ordered to cancel the Public Notice dated 17th May 2023, by way of Publication on its Notice Board, and in the Chronicle within twenty-four (24) hours and one (1) week respectively, of this order being granted.
 - 1.2 Respondent be and is hereby ordered to furnish to applicants such proof of cancellation within twenty-four (24) hours of the periods stated in paragraph 1.1 above lapsing; and

- 1.3 Respondent be and is hereby ordered to desist from its unlawful conduct of frustrating first applicant and its clients, and withholding from 1st applicant and its clients its administrative services, including issuing rates clearance certificates for Kensington Township 6, as and when they fall due, for the purposes of passing transfer of the immovable properties to first applicant's clients.
2. Respondent shall pay costs of suit on an attorney-client scale.

Interim Relief Granted:-

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

3. Applicants' application for an interim prohibitory and mandatory interdict be and is hereby granted.
4. To that end, respondent be and is hereby ordered to temporarily suspend the Public Notice dated 17th May 2023, by way of Publication on its Notice Board within twenty-four (24) hours of this order being granted, pending finalisation of this matter between the parties.
5. Respondent be and is hereby ordered to furnish to applicants with such notification and proof of suspension in this regard within twenty –four (24) hours of this order being granted, pending final relief in this matter.
6. Further, respondent be and is hereby ordered to issue second and third applicant with the rates clearance certificate in respect of stand 659, Kensington Township 6 within twenty –four (24) hours of this order being granted, and accordingly furnish applicants with proof to this effect immediately thereafter.
7. In the event of non-compliance with the order aforesaid, the Sheriff of Zimbabwe, or his lawful deputy, or assistant, is hereby empowered, authorized and directed to execute the order and give effect to it by any means authorized by law, including enlisting the services of the Zimbabwe Republic Police.
8. Respondent shall pay costs of suit on an attorney and client scale.

Service of Provisional Order

Applicant's Legal Practitioners or their authorized agents or assignees be allowed to serve a copy of this order on the respondents."

The background to the matter is this:-

The first applicant is the holder of title to several undeveloped properties known as Kensington Township 6. The second and third applicants bought part of this land from the first applicant. The second and third applicants thereafter paid inspection fees and rates in respect of the property. The respondent was supposed to issue rates clearance certificates in respect of

the said property to facilitate the second and third applicants receiving transfer of the property from the first applicant.

The first applicant and respondent are embroiled in litigation regarding the construction of roads in Kensington Township 6. As a result of the discord between the first applicant and respondent, the respondent issued a public notice, the import of which was the non-issuance of rates clearance certificates in respect of the Kensington Township 6 property.

The full text of the notice reads:-

“Suspension of the Issuance of Rates Clearance Certificates in respect of Stands Numbers 617 to 901, Kensington Township 6, Subdivision A of Hope Valley, Kuala Investments (Pvt) Ltd.

The public is hereby advised that Umguza Rural District Council shall not be issuing Rates Clearance Certificates in respect of Stands Numbers 617 to 901, Kensington Township 6: Subdivision A of Hope Valley, Plan Number BC 335, pending finalisation of a dispute between Umguza Rural District Council and Kuala Investments (Pvt) Ltd in which the Council alleges that there has been compliance with conditions of Establishment and the Development Permit, whilst Kuala Investments (Pvt) Ltd alleges that there is no compliance and has consequently instituted legal proceedings that are still pending.

Without prejudice to the Council’s position on compliance with the Conditions of Establishment and the Development Permit Umguza Rural District Council hereby suspends the issuance of the Rates Clearance Certificates for the above developments, with effect from the 7th May 2023.”

As a result of this suspension the first applicant is unable to pass transfer to the second and third applicants. This has exposed the first applicant to threats of litigation for failure to pass transfer and also first applicant’s reputation is being questioned due to the public notice.

The application is opposed by the respondent. In opposing the application the respondent took points *in limine*. These are they:-

- (i) The application is fatally defective as the founding affidavit was commissioned before a person whose qualification to so act was not indicated. The affidavit of the one representing the second and third applicant by virtue of a power of attorney is equally invalid as it is dependent on the validity of the deponent to the first applicant’s founding affidavit.

- (ii) The second and third applicants have no cause of action against the respondent and so they have been improperly joined. A rates clearance certificate is due to the seller who is the first applicant and not the purchaser.
- (iii) The deponent to the first applicant's affidavit has not shown the authority she has to so act. Equally the representative for the second and third applicants lacks authority to so act as the power of attorney she relies on gives her no such power.
- (iv) The relief sought is incompetent as applicants seek a final relief by way of an interim order.
- (v) The matter is not urgent.

This judgment is concerned with these points *in limine*. I propose to deal with the issue of urgency first. This is so because should I find that the matter is not urgent the matter will end there as it would be a contradiction to thereafter proceed to determine the rest of the points *in limine*.

Is the Matter Urgent?

Mr Chamunorwa, counsel for the respondent contended that not all complaints constitute urgency. The dispute is not one that if not determined on an urgent basis the applicants would be justified in not seeking audience thereafter. The harm contemplated does not call for urgency as the issue is just like any other litigant's.

Ms Mugova, for the applicants held a different view. Counsel argued that the matter is urgent, as not only was action taken within 3 days of the respondent's failure to respond to a letter wherein the applicants sought redress over the public notice but the harm likely to be suffered is of such a nature that an urgent adjudication of the matter is called for.

The consequences for the 1st applicant are that it will not be able to effect transfer once it sells property to the public thereby affecting its business.

Prejudice of a financial nature justifies an urgent hearing, so counsel argued.

The court was referred to the seminal case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188.

“What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is also urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.”

Granted the applicants acted soon after they failed to get a response from the respondent’s legal counsel regarding the public notice and the resultant refusal to issue clearance rates. The matter however does not end there. The aspect relating to the matter being of such a nature that it cannot wait speaks to the harm likely to be suffered if the litigant is not granted audience as a matter of urgency and allowed to jump the queue.

This point was expressed with such clarity by MAKARAU JP (as she then was) in *Documents Support Centre P/L v Mapuvire* 2006 (2) ZLR 240 at 244 C –D when she said:-

“... urgent applications are those where if the court 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.”

Turning to the facts *in casu*, the most that can happen is a delay in passing transfer to the buyers of the properties in question. The fact still remains that if such buyers have discharged their obligations as regards payment of the purchase price, title will be effected, even if there may be some delay occasioned by the issues between the seller who is the first applicant and the respondent who is the responsible authority reposed with the duty to issue rates clearance certificates.

The notice itself, reproduced earlier on in this judgment, spells out why there has been a suspension of the issuance of rates clearance certificates. Any right thinking person would not read into such notice some uncomplimentary message which dents the reputation of the 1st applicant. On the contrary the notice speaks to the first applicant’s concerns over the council’s lack of compliance with conditions set out in the development permit and is seeking redress through the legal route.

Why would any right thinking person think any less of the first applicant to the extent of damaging its reputation through whatever means?

The notice itself also provides the reason why the first applicant is unable to effect transfer to buyers due to the non-issuance of the rates clearance certificates which are a pre-requisite to the transfer of title.

What litigation can therefore ensue against the first applicant which, but for the non-issuance of rates clearance certificates, would transfer title to all those who have bought from it, the second and third applicants included.

What harm is envisaged under these circumstances which is so grave and irreversible should the matter not be dealt with on an urgent basis? I am unable to see or envision the irreversible harm which would be to the first applicant's prejudice.

In *Gwarada v Johnson* 2009 (2) ZLR 159 the issue of urgency was articulated as follows:-

“Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat.”

The key words here are “extreme prejudice.” This is so because every litigant who deems it fit to seek the court's intervention does so in order to address the prejudice their adversary is inflicting on them.

In *Triple C Pigs and Anor v Commissioner-General* 2007 (1) 27 GOWORA J (as she then was) had this to say:-

“Naturally every litigant appearing before these courts wishes to have their matter 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. Equally, the courts in order to ensure delivery of justice, would endeavor to hear matters as soon as is reasonably practicable. This is not always possible, however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant.”

In casu the applicants' cause is no different from the many litigants who are awaiting their turn to have their day in court. I find no reason that warrants affording the applicants the considerable advantage which comes with preferential treatment. Allowing a litigant to jump the queue gives them that preferential treatment which ought to be given only where a case for such has been made.

“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” (MAKARAU JP in *Document Support Centre (Private) Ltd v Mapuvire* (supra).

Granted commercial interests can make a case for urgency and in *Merspin Ltd v Cecil Madondo N.O* HB 276-18 MAKONESE J had this to say:-

“In matters involving commercial urgency, the court ought, in my view, to assess the potential prejudice to an affected party.”

Equally in *Silver's Trucks (Pvt) Ltd and Anor v Director of Customs and Excise* 1999 (1) ZLR 490, a case where the applicant was seeking the release of goods seized by the respondent, the court held that a matter can be heard as a matter of urgency not only where there is a serious threat to life or liberty but also where the urgency arises out of the need to protect commercial interests.

I found no commercial interest under serious threat to warrant hearing this matter as a matter of urgency. The matter is therefore not deserving of preferential treatment.

The respondent prayed for punitive costs. Costs are in the discretion of the court. I am not of the view that the applicants' conduct is deserving of censure. No case has been made justifying mulcting applicants with punitive costs.

In the result, I make the following order:-

1. The matter is not urgent. The point *in limine* on urgency therefore succeeds. The matter is accordingly removed from the roll of urgent matters.
2. The applicants shall pay costs at the ordinary scale, jointly and severally, the one paying the others to be absolved.

Mlotshwa Solicitors Titan Law, applicants' legal practitioners
Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners